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THE

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Court of Exchequer.

REPORTED BY

JAMES ANSTIE AND ARTHUR CHARLES,

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JUDGES

OF

THE COURT OF EXCHEQUER,

XXXVI VICTORIA.

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DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXVI VICTORIA.

BRADBURY AND OTHERS *v.* HOTTEN.

Copyright—Infringement—Appropriation of Pictures—Book—Sheet of Letterpress—5 & 6 Vict. c. 45, ss. 2, 15.

1872
Nov. 14.

The plaintiffs are the proprietors of a weekly periodical called "*Punch*." Between the years 1849 and 1867 they published in nine several numbers nine cartoons, with descriptive writing underneath them with reference to the Emperor Napoleon III. In 1871 the defendant published a work called "The Man of his Time," consisting, first, of the "Story of the Life of Napoleon III., by James M. Haswell;" and, secondly, of "The same Story as told by Popular Caricaturists of the last Thirty Years." Among the caricatures in part 2, were copies in a reduced form, sometimes with and sometimes without the descriptive writing, of the nine cartoons above mentioned. No consent from the plaintiffs to this reproduction had been obtained. In an action by them for infringement of their copyright in the several books or "sheets of letterpress" containing the cartoons:—

Held, that a substantial part of the plaintiffs' books, or sheets of letterpress, had been appropriated, and that they were entitled to recover.

DECLARATION: 1st count, that the plaintiffs were the proprietors of a subsisting copyright in a book or sheet of letterpress separately published, entitled "*Punch; or, the London Charivari*," and numbered 391, and the defendant after the passing of 5 & 6 Vict. c. 45, wrongfully, and without the consent in writing of the plaintiffs,

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printed, or caused to be printed, for sale, divers copies of certain parts of the said book or sheet of letterpress, contrary to the said statute.

2nd to 9th counts for similar infringements by copying parts of other numbers of *Punch*.

Plea: Not guilty. Issue.

The cause was tried at the Middlesex sittings after Trinity Term, 1872, before Bramwell B., when it was proved that the plaintiffs were the owners of the copyright of the weekly periodical called "*Punch*," and that between the years 1849 and 1867 (viz., in 1849, 1851, 1853, 1854, 1855, 1859, and 1867) they had published in that periodical the nine woodcuts mentioned in the declaration, with descriptive words printed beneath them, illustrative of the career of the Emperor Napoleon III. These woodcuts were reproduced by the defendant, without the plaintiffs' consent, in a book published by him in 1871, in a reduced form, sometimes with and sometimes without the descriptive letterpress. The defendant's book was entitled "The Man of his Time," and consisted of two parts: part 1 being "The Story of the Life of Napoleon III., by James M. Haswell," and part 2 being "The same Story as told by Popular Caricaturists of the last Thirty Years." The second part, in addition to the nine pictures selected from *Punch*, contained many other illustrations from English and foreign comic journals. A verdict was entered, upon proof of these facts, for the plaintiffs for 40s., with leave to move to enter a verdict for the defendant.

A rule nisi was afterwards obtained accordingly, on the ground that there was no evidence of any infringement of copyright, the Court to draw such inferences as a jury might. (1)

Manisty, Q.C., and *R. G. Williams*, shewed cause. This is a clear case of infringement. The defendant has appropriated nine cartoons from nine different numbers of *Punch*. Each number is

(1) 5 & 6 Vict. c. 45, s. 15, enacts that if any person shall in any part of the British dominions print or cause to be printed either for sale or exportation any book in which there shall be subsisting copyright without the consent in writing of the proprietor thereof . . . such offender shall be liable to a special action on the case at the suit of the proprietors of such copyright." Sect. 2 enacts that the word "book" shall be construed to mean and include "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published."

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a "sheet of letterpress" and a "book" within the meaning of 5 & 6 Vict. c. 45, s. 2. The cartoon is part and parcel of the sheet of letterpress, and to take out the cartoon either with or without the descriptive writing is piracy: *Bogue* v. *Houlston.* (1)

[CHANNELL, B. The question really is, whether in its new form each picture is not part of a new and original production though copied from an old one.]

The new work reproduces the old illustrations for the same purpose as that for which they were originally published—to excite amusement. Nor are the appropriations insignificant. These cartoons were originally produced with great labour and at great expense, and if they may be collected and republished in the lives of the various persons to whom they refer, the plaintiffs' property will be materially affected.

[BRAMWELL, B. The intuitus with which the pictures are taken is what must chiefly be considered. Suppose an author wrote a book of travels and incidentally described the composition of some favourite dish, and then the writer of a cookery manual copied the description, that would not be piracy.]

No; because there the objects of the two works are entirely different. Here the reproduction is for the same object as the first publication. There is an appropriation of labours paid for by the plaintiffs for the defendant's own purposes: *Hotten* v. *Arthur* (2); *Campbell* v. *Scott* (3); *Sweet* v. *Maugham* (4); *Sweet* v. *Benning* (5); *Archbold* v. *Sweet.* (6)

[BRAMWELL, B. Suppose a man selects a few verses from a book of poetry and sets them to music, would that be piracy?]

Yes, if an appreciable part of the book were taken, although, no doubt, a verse might, under some circumstances, be adopted without objection. In the present case the most valuable parts of the periodical are in each instance selected, and it is no excuse that the defendant has not taken more.

Parry, Serjt., and *J. O. Griffits*, in support of the rule. The defendant's work is a new and original one, and the pictures reproduced are taken not from *Punch* only, but from other comic

(1) 5 De G. & S. 267; 21 L. J. (Ch.) 470.
(2) 1 H. & M. 603; 32 L. J. (Ch.) 771.
(3) 11 Sim. 31.
(4) 11 Sim. 51.
(5) 16 C. B. 459; 24 L. J. (C.P.) 175.
(6) 5 C. & P. 219.

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journals. Nor are all the pictures in *Punch* relating to the emperor taken, but only a very few, illustrating particular passages in his life. There is nothing in common between the purposes of the defendant and that of the plaintiffs. A different object is aimed at and a different class of readers appealed to, and the defendant has only made a fair and legitimate use of the plaintiffs' labours: *Martin* v. *Wright* (1); *Cary* v. *Kearsley* (2); *Spiers* v. *Browne.* (3) A new result is here attained by the defendant's exertion, and one which can in no way interfere with the plaintiffs' profit: *Wilkins* v. *Aikin* (4); *Bramwell* v. *Halcomb* (5); *Murray* v. *Bogue.* (6) Moreover, each number of *Punch* must be looked at separately, and each act of alleged infringement stands alone. The nine acts complained of are rightly charged in separate counts of the declaration. Looking at them then singly, it cannot be said that any of the pictures have been republished for the same purpose as that for which they were originally published. *Punch* is a satirical commentary on the topics of the day; the defendant's book is the life of one individual drawn not from *Punch* only, but from comic publications in all countries. The extracts from *Punch* are insignificant, and constitute nothing more than a reasonable reference to periodical literature. What has been done can cause no possible injury to the plaintiffs.

[PIGOTT, B. The plaintiffs might themselves have collected all the cartoons relating to Napoleon III., or may still find it profitable to do so.]

Even if they should, the publication of a few of the pictures in a work compiled as the defendant's is, would not cause them any appreciable damage.

KELLY, C.B. I am of opinion that the plaintiffs are entitled to retain their verdict. The questions raised are of interest and importance, but it is difficult to lay down any fixed principle with regard to them. No doubt the matter is, to a great extent, one of degree. It may well be that an author might copy into his book a portion of some books previously published, and yet that a jury might be justified in finding there had been no infringement of

(1) 6 Sim. 297.
(2) 4 Esp. 168.
(3) 6 W. R. 352.
(4) 17 Ves. 422.
(5) 3 My. & Cr. 737.
(6) 1 Drew. 353; 22 L. J. (Ch.) 457.

17 Jur 219

copyright; whilst, on the other hand, the copying might take place under such circumstances as clearly to amount to an infringement. Now, in considering the present case, let us first clear the way by inquiring whether there is any technical difficulty upon the construction of the statute which prevents the plaintiffs from maintaining this action. The statute protects any books or sheets of letterpress, and here the plaintiffs' publication consists of a sheet of letterpress, folded like a book, and made up partly of printed matter and partly—to use a generic term—of pictures, which are in many cases illustrated or explained by a small portion of letterpress underneath them. Nine of these pictures the defendant has copied, in some instances alone, in others with the addition of the printed words underneath them. If they have been so copied as to amount to a copy of a material part of the plaintiffs' publication, and the defendant has thus obtained a profit which would or might otherwise have been the plaintiffs', then there has been a piracy for which the defendant is responsible.

It is said that to copy a single picture, at all events, could not be an infringement of the plaintiffs' copyright, but it is impossible to lay that down as a general rule. I can easily conceive a case where such an act would not be piracy. For example, where a picture is reproduced amongst a large collection published for an entirely different object from that which the first publisher had in view. We must consider in such a case the intent of the copyist, and the nature of his work. To turn for a moment from pictures to printed matter, the illustration put during the argument by my Brother Bramwell will explain my meaning. A traveller publishes a book of travels about some distant country like China. Amongst other things he describes some mode of preparing food in use there. Then the compiler of a cookery book republishes the description. No one would say that that was piracy. So again an author publishes a history illustrated with woodcuts of the heads of kings, and another person writing another history of some other country finds occasion to copy one of these woodcuts. That again would not be a piracy. Yet, on the other hand, the copying of a single picture may, under some circumstances, be an infringement. For example, take the case of a work illustrated by one engraving of the likeness of some distinguished man where no other likeness is

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extant. No one would have a right to copy that into a book upon any subject whatever, and a jury would in such a case rightly find that there had been an infringement of the copyright.

To return to the facts of the present case: the defendant has introduced nine pictures of the plaintiffs' into what I may call his comic life of Napoleon III. Is he by so doing applying to his own use and for his own profit what otherwise the plaintiffs might have turned, and possibly still may turn, to a profitable account? The pictures are of great merit, and no doubt were largely paid for, and by inserting these copies the defendant has unquestionably added to the value of his publication. Why should this not be an infringement? It was said by my Brother Parry, in his able argument, that the plaintiffs will never make such a use of these pictures as the defendant has made. But suppose, as my Brother Pigott suggested, that after the catastrophe which ended in the fall of Napoleon III., the proprietors of *Punch* had chosen to republish all their caricatures of him, or that even now they should choose to do so. One cannot help seeing that the defendant's publication might cause many, who would otherwise have bought, to refrain from buying such a work.

I need not refer at length to the authorities cited. The principle of them is, that where one man for his own profit puts into his work an essential part of another man's work, from which that other may still derive profit, or from which, but for the act of the first, he might have derived profit, there is evidence of a piracy upon which a jury should act. One of the cases cited—*Bogue* v. *Houlston* (1)—seems to me directly in point, and seems to have been considered by the Vice-Chancellor as a clear case, for otherwise he would not have granted an injunction. On principle and authority, therefore, I think this rule should be discharged. My Brother Channell, who has been obliged to leave the court, concurs in this judgment.

10 C.B. 681

BRAMWELL, B. I am of the same opinion, though not without some doubt—doubt which it is natural to feel in a case like this, which is on the border land between piracy and no piracy. But I think the plaintiffs are entitled to succeed. They are the pro-

(1) 5 De G. & S. 267; 21 L. J. (Ch.) 470.

prietors of a sheet of letterpress within the meaning of the Act of Parliament. Now it is quite true, that when a man publishes anything he professes to add to the common stock of knowledge, and everybody may avail himself of what is published. This may be illustrated by the case put, of the compiler of a cookery book taking from some traveller's account of his travels a receipt for a new dish. But applying that principle here, it does not exonerate the defendant. If he had said, "I propose to illustrate my history by extracts from the satirists of the day," and had then gone on to quote to a reasonable extent the opinions, or even the very words of satirical writers, no one would call that piracy. Suppose, for instance, he had said, "At this period of his career Napoleon was unpopular and the subject of ridicule in England. This may be seen by examining the sort of pictures of him which appeared in *Punch*. Later on he became more popular, and the pictures published represented him more favourably." That could not have been complained of. Then the defendant would simply have been using the knowledge acquired from *Punch* for his own benefit, as he would have a right to do. But here he has done more. He has not availed himself of the knowledge acquired from *Punch*, but he has actually reproduced the very pictures published in *Punch*, and for the same purpose as they were originally published, namely, to excite the amusement of his readers. That seems to me to be an infringement of the plaintiffs' copyright.

PIGOTT, B. I am of the same opinion. The question is, whether a substantial part of the plaintiffs' publication has been appropriated, and I cannot doubt that it has. The pictures are a vital part of *Punch;* they are the result of labour, originality, and expenditure, and from their great merit are of permanent value. That being so, the defendant has reproduced nine pictures, and with the same object as the plaintiffs had in their original publication. That appears to me to amount to a piracy. The rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiffs: *Chester, Urquhart, Bushby, & Mayhew.*
Attorneys for defendant: *Hughes & Son.*

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Nov. 7.

DAWSON *v.* THE MIDLAND RAILWAY COMPANY.

Railway Company—Liability to fence—Owner and occupier of adjoining Land —Licensee of Occupier—8 & 9 *Vict. c.* 20, *s.* 68.

9 QB 264

The plaintiff hired of the occupier of some land adjoining the defendants' line of railway a stable for his horse. The horse was allowed to graze during the day on the land. One night it escaped from the stable on to the land, and thence, through a defective fence, on to the defendants' line, where it was run over and killed by a train. In an action for the value of the horse:—

Held, that the plaintiff was entitled to the benefit of 8 & 9 Vict. c. 20, s. 68, whereby railway companies are bound to maintain sufficient fences for the protection of the cattle of the "owners or occupiers" of land adjoining their line, and that the defendants were therefore liable.

THIS was an action against the defendants for not fencing their line from adjoining land in accordance with their statutory obligation under 8 & 9 Vict. c. 20, s. 68, whereby a horse of the plaintiff strayed on to the defendants' line, and was killed by a passing train. At the trial before Blackburn, J., at the Warwick Summer Assizes, 1872, it was proved that the plaintiff had hired of the occupier of some land adjoining the defendants' line the use of a stable for his horse; and it was also arranged that the horse should be allowed to graze during the day in a field separated from the line by a fence. For this privilege no rent was paid. One night the horse escaped from the stable into the field, and thence strayed through a fence, which was admitted to be defective, on to the defendants' line, where it was run over and killed by a train. A verdict was, on proof of these facts, entered for the plaintiff for the value of the horse, with leave to move to enter it for the defendants if the Court should think them under no liability towards the plaintiff to fence.

The 8 & 9 Vict. c. 20, s. 68, enacts that a railway company shall make and maintain "for the accommodation of the owners and occupiers of lands adjoining the railway . . . sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway."

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Field, Q.C., moved for a rule in pursuance of the leave reserved. The plaintiff was not the owner or occupier of the adjoining land. His horse, it is true, grazed by day in the field by the licence of the occupier; but when the accident happened it was straying. It was not there at that time with the occupier's assent, and that being so, the statute is inapplicable: *Dovaston* v. *Payne* (1); *Ricketts* v. *East and West India Docks Ry. Co.* (2)

KELLY, C.B. There should be no rule in this case. The plaintiff's horse was lawfully in the field, from which it escaped through defect of the defendants' fences. It is said that the statutory duty is only imposed on the defendants as far as regards "owners or occupiers" of the adjoining land. But here we must take it that the horse was upon the close with the licence of the occupier; and that being so, in my judgment the defendants are liable.

MARTIN, B., concurred.

BRAMWELL, B. I am of the same opinion. The statute appears to me to be for the benefit of all persons who are lawfully using adjoining land.

PIGOTT, B., concurred.

Rule refused.

Attorney for defendants: *Blenkinsop.*

(1) 2 H. Bl. 527; 2 Sm. L. C. 6th ed. 132.
(2) 12 C. B. 160; 21 L. J. (C.P.) 201.

1872
Nov. 8.

GARNETT *v.* M'KEWAN (P.O.).

Banker and Customer—Branch Establishments—Bankers' Right to combine Accounts—Notice.

The plaintiff having an account at the L. branch of the defendants' bank, which shewed a balance to his credit exceeding 23*l.*, drew cheques to that amount on that branch. At the same time he was indebted to the bank at their B. branch in an amount which, having regard to his whole account, reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the B. debt to the L. branch, and refused to pay the cheques on presentment. There was no special contract between the parties that each account should be kept separate:—

Held, that the bank was entitled at any time to combine the accounts, and to charge the L. account with the B. debt.

DECLARATION against the defendant as public officer of the London and County Banking Company.

1st count, in the ordinary form, for not honouring the plaintiff's cheques at the Leighton Buzzard branch of the bank.

2nd count: That the company carried on business at Buckingham and Leighton Buzzard, and the plaintiff retained them as his bankers upon the terms (among others) that they should keep separate and distinct accounts of the plaintiff's transactions, and of the moneys received by them from the plaintiff at each place, and should not out of the moneys received by them at one place reimburse themselves any moneys advanced by them to the plaintiff at the other, without first giving him reasonable notice, and that they would from time to time out of the balance due to the plaintiff on either account, pay his cheques presented at either place, irrespective of the state of the account at the other; that afterwards, and while there was a sufficient balance to the plaintiff's credit at Leighton Buzzard, and before any notice was given to him, the plaintiff drew three cheques on the Leighton Buzzard branch bank, and all conditions were fulfilled, &c., yet the company did not pay the cheques when presented.

Pleas (inter alia), 1. To 1st and 2nd counts. Traverse of the retainer in these counts respectively alleged.

2. To 1st count: That at the times when the cheques were respectively presented there was not sufficient means of the plaintiff in the hands of the company to pay them.

3. To 2nd count: That at the times, &c., the cheques and each of them exceeded the amount due to the plaintiff on the Leighton Buzzard account.

Issue.

At the trial before Bramwell, B., at the Middlesex sittings after Trinity Term, 1872, the following facts were proved:—The plaintiff, who was an auctioneer and cattle-salesman, opened an account in the year 1866 at the Buckingham branch of the London and County Banking Company. In June, 1868, the account was overdrawn, and in August it was closed. There was then a balance against the plaintiff amounting to 42*l.* 15*s.* 11*d.* In December, 1871, the plaintiff having established two cattle sales in Bedfordshire, opened an account with the company at their Leighton Buzzard branch. On the 18th of January, 1872, this account on the pass-book being made up, shewed a balance to the plaintiff's credit of 48*l.* 2*s.* 5*d.* Between that day and the close of the month there were several transactions, and on the 31st the account shewed a balance of 42*l.* 18*s.* 10*d.* in the plaintiff's favour. On that day three cheques drawn by the plaintiff, and amounting to 23*l.* 3*s.*, were presented and dishonoured; and on the day following he received a letter from the manager of the Leighton Buzzard branch, dated the 31st of January, telling him that on that day the company had charged to his account the 42*l.* 15*s.* 11*d.* due to the Buckingham branch.

The learned judge was of opinion that the company were, in the absence of any evidence of a special contract or course of dealing, justified in debiting the Leighton Buzzard account with the Buckingham debt, without giving the plaintiff notice. A verdict was accordingly entered for the defendant, with leave to move to enter a verdict for the plaintiff for 40*s.* and the amount of the dishonoured cheques, if the Court should think that there was any evidence entitling him to maintain the action.

Graham (*Waddy* with him) moved accordingly. The company had no more right to debit the Leighton Buzzard account with the Buckingham debt than they would have had to debit it with a debt due to them from the plaintiff, not as bankers, but in some other capacity. The two branches are perfectly distinct; and having

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regard to the mode in which the parties had been dealing, the company ought at all events to have given the plaintiff a reasonable notice before transferring his debt from Buckingham to Leighton Buzzard. In *Cumming* v. *Shand* (1), where the usual course of dealing was for the banker to credit his customer against bills paid in, he was held liable for dishonouring a cheque without giving any notice of his discontinuing such dealing. This is an analogous case.

[He also cited *Hill* v. *Smith* (2), and *Shaw* v. *Dartnall.* (3)]

KELLY, C.B. I am clearly of opinion that there should be no rule. The question substantially raised by the pleadings is whether any money of the plaintiff's was in the hands of the London and County Bank, which they were bound to pay upon the presentment of his cheque. The answer must depend upon whether they were indebted to that amount to the plaintiff. Now, in fact, they were not so indebted. If, therefore, they are liable in this action, it must be by virtue of some special contract or well recognized course of dealing.

It appears that the plaintiff was desirous of keeping an account with the London and County Bank, and it suited his convenience —and was for their profit no doubt—that he should deposit cash in their hands both at Leighton Buzzard and Buckingham, where they had establishments. And if the plaintiff had had a balance in his favour at both places he could of course have drawn at either to the extent of the balance there. But the fact was, that whilst he had a balance in his favour at Leighton Buzzard it was almost exactly equalled by a balance against him at Buckingham. The defendant's bank, therefore, had scarcely a shilling of his money, and I cannot see why they were bound to honour his cheque at Leighton Buzzard just because there was a balance at that branch in his favour. It is contended that the branches are quite distinct, and the defendant's bank have no more right to set off at the Leighton Buzzard branch a debt due to them as bankers at Buckingham than they would have to debit a debt due to them in some other capacity—as brewers, for example—against the plain-

(1) 5 H. & N. 95 ; 29 L. J. (Ex.) 129.
(2) 12 M. & W. 618.
(3) 6 B. & C. 56.

tiff's account. It must be remembered, however, that the plaintiff might have ordered a transfer of his assets from the one branch to the other, and the defendants' bank, on the other hand, must have a corresponding right. In general it might be proper or considerate to give a notice to that effect, but there is no legal obligation on the bankers to do so, arising either from express contract or the course of dealing between the parties. The customer must be taken to know the state of each account, and if the balance on the whole is against him or does not equal the cheques he draws, he has no right to expect those cheques to be cashed. We all know what the actual practice of bankers is where there are branches. In such cases the managers of each branch are in the habit of communicating with each other, and honour cheques of the customer according to the state of his general account. But there is certainly no usage according to which the customer is entitled to expect his cheques to be honoured at one branch where he happens to have a balance to his credit, when at the same time that balance is counterbalanced by a debit against him at another branch.

With respect to the cases cited, they are distinguishable. In *Hill* v. *Smith* (1) the customer sent money to the bank for the specific purpose of meeting a particular bill, and that money no doubt the bankers, having accepted it for that purpose, could not set off against the general account. In the other case cited, *Cumming* v. *Shand* (2), a special contract was established, and the defendant was on that account held not to be entitled to refuse to honour the plaintiff's cheques. Here there was no special contract and no usage proved, and in the absence of either, the mere fact of there being two branch establishments is not enough to entitle the plaintiff to recover. The rule must therefore be refused.

MARTIN, B. I am of the same opinion. The question is really one rather of fact than of law. The relation between banker and customer is that of debtor and creditor with a superadded obligation on the part of the banker to honour the customer's cheques so long as there are any assets of his in the banker's hands. So it was expressed in the judgment of the Court in *Pott* v. *Clegg*. (3) But the

(1) 12 M. & W. 618. (2) 5 H. & N. 95; 29 L. J. (Ex.) 129.
(3) 16 M. & W. at p. 328.

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mere existence of an apparent balance, if there is no real balance, is not enough to render the bank liable to pay a cheque at the branch where the apparent balance is. There was no evidence that in this case the bankers undertook to cash cheques at one branch when the whole accounts shewed that the customer had no sufficient balance. No special contract, nor any usage or course of dealing to that effect was proved.

PIGOTT, B. I also think the rule should be refused. Where there are branch banks the same relation between banker and customer exists, in the absence of any special contract, as in the case where there is one establishment only. There is no duty on the part of the bank to keep the accounts separate. No one would say that a banker might set off against his customer's account a debt due to him from his customer in another capacity, a private debt, for example, or a debt due to him as carrying on some distinct business. Nor has a banker any right to confound two accounts lodged with him by one person in two different capacities. He would have no right to blend a personal and a trust account. But here there is nothing to prevent the banker from taking into account the state of the plaintiff's balance as a whole; and upon such account being taken, it appeared that the plaintiff had no sufficient assets to meet the cheques presented. The banker was therefore justified in dishonouring them.

BRAMWELL, B. I thought the defendant entitled to the verdict at the trial, and I still think so; though my opinion is not a very confident one. My doubt arises thus: The money is paid to the customer's account at a particular place, and except at that place he cannot call upon the bank to pay, although he may happen to have a balance at another branch establishment. Is not the obligation correlative? The bank is not liable to be called on to pay at one branch just because there is a balance at another. Why, then, may the bank without notice debit the customer's account at one branch with his deficiency at another? The question is one of mixed law and fact. It is admitted that in some cases the bank could not debit the customer with a debt due to them; for example, a debt due to the bank as carrying on a different business, as that of brewers. Nor, again, would they have

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any right to blend two accounts kept by one person with them in different characters, as a personal and a trust account. But here there was nothing except the fact that there were two branch establishments. Nothing was said as to their being separate, and nothing should be implied. If indeed it was understood and agreed that the branches should be kept separate, then the plaintiff is right, but not otherwise. And with regard to the correlative rights of the parties, it must be remembered that if a customer might draw anywhere where he had a balance, no matter what the real debit against him might be, there would be a real hardship on bankers and a difficulty in their conducting business. But to limit his drawing to the amount of his total actual balance is no hardship on him, for he always knows, or can know if he likes, the state of his account as a whole. In practice, bankers do constantly allow overdrawing at a particular branch, because they know they may debit the customer with his balance at some other branch. It may be convenient and proper for them to give the customer notice of their intention to do so, but there is no legal obligation upon them to give such notice.

I think, therefore, that the customer has no claim, for he is indebted to the bank on his whole account in such an amount as to reduce his assets to almost nothing. There is no duty, in my opinion, apart from usage or contract, on the part of the banker to honour cheques at one branch because the customer has a credit there, if at another branch there is a countervailing debit. I agree, therefore, that the rule must be refused.

Rule refused.

Attorney for plaintiff: *Rogers.*

1872
Nov. 9.

SMITH *v.* HALEY.

Costs—Writ of Trial—Nature of Action—Costs on lower Scale—Certificates—Directions to Masters, Hilary Term, 1853.

In an action of debt the writ was indorsed for 50*l.* 3*s.*, which was reduced upon the trial, by a set-off, to 15*l.*, and a verdict was entered for the plaintiff for the latter amount, the judge certifying, under the County Courts Act, 1867, s. 5, that there was sufficient reason for bringing the action in the superior Court. He did not certify on the postea that the "cause was proper to be tried before him":—

Held, that in the absence of the latter certificate, the plaintiff's costs were to be taxed under the 7th direction to the masters, Hilary Term, 1853, upon the lower scale, the case not being one in which, "by reason of the nature of the action," no writ of trial could be issued.

In an action of debt tried before Keating, J., at the Suffolk Summer Assizes, 1872, a verdict was taken for the plaintiff, for the claim in the declaration, subject to a reference, the arbitrator to have all the powers as to certifying, &c., of a judge at nisi prius. The writ was indorsed for a sum of 50*l.* 3*s.*, which the plaintiff proved to be primâ facie due to him. This amount was, however, reduced by a set-off on the reference, to 15*l.*, and the verdict was entered for that sum, the arbitrator certifying, under the County Courts Act, 1867, s. 5, that there was sufficient reason for bringing the action in a superior court.

Upon taxation the master refused to allow costs on the higher scale, being of opinion that the 7th direction to the masters, of Hilary Term, 1853, was applicable, and that the arbitrator not having certified on the postea that the cause was proper to be tried before him, the lower scale of costs only could be allowed. The plaintiff appealed to a judge, who referred the matter to the Court.

The 7th direction is as follows:—"In all actions of contract, other than cases in which by reason of the nature of the action no writ of trial can by law be issued, where the sum recovered . . . shall not exceed 20*l.*, the plaintiff's costs shall be taxed according to the lower scale . . . provided that if the judge shall certify on the postea that the cause was proper to be tried before him . . . the costs shall be taxed on the higher scale."

Graham moved for a rule to review the master's taxation. No

writ of trial can issue except where less than 20*l.* is claimed (see 3 & 4 Wm. 4, c. 42, s. 17, which enacts that "in any action depending in any of the superior courts for any debt or demand in which the sum sought to be recovered and indorsed on the writ of summons shall not exceed 20*l.*," it shall be lawful for a Court or judge to order the issues to be tried before the sheriff, and a writ of trial shall issue accordingly); and the arbitrator's certificate, under the County Courts Act, 1867, s. 5, is therefore all that was required, as the 7th direction does not apply to cases where, by reason of the nature of the action, no writ of trial can by law be issued; *Perry* v. *Bennett* (1), where Erle, C.J., says that, "The power to order a writ of trial to issue is confined to cases where the sum sought to be recovered and indorsed upon the writ of summons does not exceed 20*l.*"

[CHANNELL, B. That case proceeded on the fact that there was no writ of summons at all; but only a plaint removed by certiorari from the county court.]

The marginal note makes it so appear, but the judgments, both of Erle, C.J., and Willes, J., treat the amount of the indorsement as part of the "nature of the action."

BRAMWELL, B. There should be no rule in this case. The practice of the Court has long been in accordance with the master's decision, and the Court has frequently expressed its approval—though not formally by way of judicial decision—of that practice. Now, I quite agree that the arbitrator's certificate is equivalent to that of a judge; but here it was given under the County Court Act, 1867, and without it the plaintiff would have been entitled to no costs at all. It does not affect the scale of taxation. The question, therefore, is whether the direction to the master includes the present case. Certainly it does, and the words of exception do not apply. For this is not a case where, "by reason of the nature of the action," no writ of trial could be issued. The writ can be issued in any action "for any debt or demand;" that is the "nature of the action." It is true words follow in 3 & 4 Wm. 4, c. 42, s. 17, as to the indorsements on the writ, but they do not affect the "nature of the action," and are not part of it. Otherwise, any plaintiff could

(1) 14 C. B. (N.S.) 402; 33 L. J. (C.P.) 45.

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evade the rule by indorsing a larger sum than that mentioned. It may seem at first sight that this construction may bear a little hardly upon a plaintiff who has, as here, indorsed his writ bonâ fide. But a remedy for this hardship, if it be one, is to be found in the proviso that the judge may certify on the postea for costs on the higher scale; and the arbitrator in this case should have been asked for this certificate.

The case referred to does not decide anything opposed to this view. For, there, there was no writ, and the "nature of the action" meant or might mean the nature of the origin of the proceeding. At all events, it did not necessarily refer to the amount mentioned in the indorsement.

CHANNELL, B. I am of the same opinion. The direction contains three parts: the enacting part, the exception, and the proviso. Clearly this case is within the enacting part, and it is not within the exception, for there is nothing in the "nature of the action" to prevent a writ of trial from issuing, and the proviso prevents any hardship arising from such a construction.

In the case cited the plaintiff had begun his action in the county court, and removed it by certiorari; and on that ground the Court, as the marginal note indicates, proceeded.

PIGOTT, B. I am of the same opinion. The case cited is distinguishable upon the grounds pointed out by my learned Brothers. The marginal note gives the real key to that decision.

Rule refused.

Attorney: *W. Rogers, for Stimson, Bedford.*

PRESTON *v.* DANIA AND ANOTHER. 1872

Nov. 18.

Bond—Bond for Money payable by Instalments—Common Law Procedure Act, 1860 (23 & 24 *Vict.* c. 125) s. 25.

The Common Law Procedure Act, 1860, s. 25, permits payment into court to be pleaded by leave of the Court or a judge in any action on a bond "which has a condition to make void the same upon payment of a lesser sum at a day or place certain":—

Held, that this enactment does not apply to an action brought on a bond conditioned to be void upon payment of a lesser sum by instalments.

DECLARATION on a bond for 5000*l.*, conditioned to be void on payment of 2500*l.* with interest by five instalments of 400*l.* and one of 500*l.* between the 1st of January, 1869, and the 1st of January, 1875, stating that all conditions were performed, &c., yet the defendants did not pay on the 1st of January, 1872, the instalment of 400*l.* with interest due on that day.

Plea: Payment into court of the instalment due.

Demurrer and joinder.

C. W. Wood, Q.C. (*Edwards* with him), in support of the demurrer. A bond for the payment of money by instalments is not within the Common Law Procedure Act, 1860, s. 25 (1), which is strictly confined to common money bonds subject to the provisions of 4 & 5 Anne, c. 16, s. 13 (2), where only one breach can be assigned. Bonds for moneys payable by instalments are within 8 & 9 Wm. 3, c. 11, s. 8 (3), being for non-performance of several covenants or

(1) The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 125), s. 25, enacts that, "in any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, it shall be lawful for a Court or a judge, and upon such terms as they or he shall think fit to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond; and such payment into court shall be made and pleaded in like manner and according to the provisions of the Common Law Procedure Act, 1852."

(2) By 4 & 5 Anne, c. 16, s. 13, where an action is brought upon any bond "which has a condition to make void the same upon payment of a lesser sum at a day or place certain," power is given to a defendant to bring the principal and interest due into court in satisfaction of the bond, and the Court may give judgment to discharge the defendant from the same accordingly.

(3) By 8 & 9 Wm. 3, c. 11, s. 8, it is

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agreements, in which case the plaintiff may assign as many breaches as he thinks fit, and whilst the defendant may bring into Court the damages assessed for the breaches and so have execution stayed, the plaintiff is entitled to the judgment as a security against further breaches: *Smith* v. *Bond* (1); 1 Notes to Saunders, by Williams, p. 69, note (b); *Darby* v. *Wilkins.* (2) In such a case there can be no payment into court, except perhaps in respect of the last instalment.

Holker, Q.C. (*Kennedy* with him), contrà. This bond is for 5000*l.* to secure the payment of 2500*l.* It has therefore a condition "to make void the same upon payment of a lesser sum at a day or place certain," and the circumstance that the lesser sum is to be paid by instalments, does not take it out of the operation of the Common Law Procedure Act, 1860, s. 25. That statute uses the same language as the 4 & 5 Anne, c. 16, and any bond within the latter is within the former. Now, although the 4 & 5 Anne, c. 16, relieving an obligor against the penalty of common money bonds primarily applies only to bonds for a sum payable at one time or place, it is also applicable to money bonds payable by instalments: see per Lord Mansfield, C.J., in *Bonafous* v. *Rybot* (3); *Bridges* v. *Williamson.* (4) An instalment therefore might have been brought into court under 4 & 5 Anne, c. 16, s. 13, and such a payment may now be pleaded.

Wood, Q.C., was not called on to reply.

BRAMWELL, B. I am clearly of opinion that this plea is bad. Look for a moment at the history of these bonds. Originally the

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enacted, that in all actions upon any bond or on any penal sum for non-performance of any covenants or agreements in any deed or writing contained, the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess not only such damages as were before usually done, but also damages for such of the breaches as the plaintiff shall prove to have been broken, and that the like judgment shall be entered on the verdict as before had been usually done in such actions, ... and in case the defendant shall pay into court the damages assessed for the breaches, a stay of execution shall be entered . . . but notwithstanding in each case the judgment shall remain as a security against any further breaches upon which the plaintiff may have a scire facias.

(1) 10 Bing. 125.
(2) 2 Str. 957.
(3) 3 Bur. 1370.
(4) 2 Str. 814.

penal sum mentioned in them was recoverable. Then the Courts of equity, unfortunately as I think, established a practice of relieving the obligor from payment of the penalty—of relieving him, that is to say, from the obligation of doing what he had contracted to do. And the legislature finding this practice in existence, thought it undesirable that a man should have to go to equity for relief, and accordingly passed two statutes, the 8 & 9 Wm. 3, c. 11, and the 4 & 5 Anne, c. 16, on the subject. The former enacts (s. 8) that "in all actions on any bond, or on any penal sum, for non-performance of any covenants and agreements in any deed or writing contained, the plaintiff may assign as many breaches as he shall think fit," and the jury are to assess the damages on the breaches; but the like judgment is to be entered as before for the whole penalty and costs, and "shall remain as a security against any further breaches." It is plain that the bond declared on is within this statute, which applies to all bonds, except a common money bond. Such a bond is not within the statute, because only one breach can be assigned, and the penal sum is not for the non-performance of several covenants. The matter is clearly put in the Notes to Saunders, by Williams, vol. i. p. 69, note (b), where it is said, "all other bonds [i.e., bonds other than those previously enumerated], including common money bonds, either for the payment of money by instalments or of annuities, or for the performance of any covenants or agreements, are within the statute."

Now, it is clear to my mind that the statute 4 & 5 Anne, c. 16, applies to common money bonds only; but not to any bond within the meaning of the former statute; and the Common Law Procedure Act, 1860, s. 25, deals, like the 4 & 5 Anne, c. 16, with bonds conditioned to be void "upon payment of a lesser sum at a day or place certain," and with those only; and if it is to be held applicable to a bond for the payment of money by instalments, I do not see why it should not be held equally applicable to bonds, for example, to secure the fidelity of a clerk. The words used do not cover such a case, and apply simply to bonds where there can be but one breach. The present case, therefore, is not within the letter, and certainly not within the reason of the Act.

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With regard to the authorities cited, the two cases in Strange seem to be in conflict, and one may be set off against the other. But there is also the authority of Lord Mansfield in *Bonafous* v. *Rybot.* (1) Now, as to this, I must first observe that the dictum relied on was obiter; it was not necessary to the decision of the case, because the rule was discharged, the whole principal being due. But I must add, with great respect to so high an authority, that I dissent entirely from what was there said. After describing the nature of a bond as being a security for the principal and interest due, and referring to the relief given against the penalty by equity, Lord Mansfield goes on to remark that it is extraordinary that "the Courts of law did not follow equity, but still continued to do injustice as of course." I differ entirely from this view. Where is the injustice of holding people to mean what they say? Where is the injustice of making a man perform what he chooses to promise? I protest I can see none. And to relieve a man from his obligations on some supposed equitable considerations, seems to me to be a mischievous thing. If relief is required, let the legislature interfere. It is there that the remedy must be sought. It is not the function of Courts of law to apply it. They have to administer the law as it is, and any attempt on their part to mend it only leads to uncertainty in the administration of justice.

My judgment, therefore, is for the plaintiff. This bond is not within 4 & 5 Anne, c. 16; but within 8 & 9 Wm. 3, c. 11, under which the defendant has a remedy, of which Lord Mansfield seems entirely to have lost sight; but under which also the plaintiff has a right to his judgment as a security—a right of which he ought not, without express words, to be deprived.

CHANNELL, B., concurred.

PIGOTT, B. I am of the same opinion. Whether the 13th section of 4 & 5 Anne, c. 16 applies to a bond payable by instalments, where everything has been paid but the last instalment sued for, so that no further breach is possible, I do not say. It is clearly inapplicable to an action for one instalment, others remaining due,

(1) 3 Bur. 1370.

and the words of the Common Law Procedure Act, 1860, s. 25, which are precisely similar, are equally inapplicable.

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Judgment for the plaintiff

Attorney for plaintiff: *Forster.*

Attorneys for defendants: *Milne, Riddle, & Mellor.*

DILLON *v.* CUNNINGHAM.

Nov. 22.

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), s. 5—*Order for Payment—Married Woman.*

An order under the Debtors Act, 1869, s. 5, may be made upon a married woman.

An order for payment under s. 5 may be made without any proof of means.

THE defendant in this action was a married woman; she was sued on her promissory note for 50*l.* given after her marriage; and coverture not being pleaded, judgment was recovered against her on the 24th of August, 1872.

A summons was taken out before Quain, J., for an order for payment under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5; and on proof that the defendant had property settled to her separate use (without power of anticipation) to the amount of 150*0l.* a year, the income of which was payable in January and July, the learned Judge made an order on her for payment of the judgment debt and costs and costs of the application, with interest on the debt at 4 per cent. from the date of the judgment, by two instalments, that is to say, 25*l.* on the 20th of January, 1873, and the residue and costs on the 20th of July following.

Willis having obtained a rule to set aside this order on the ground that there was no evidence of the defendant having had since the date of the judgment, or having at the time of the order the means to pay the sum in respect of which the defendant had made default, and on the ground that the defendant, being a married woman, was not within 32 & 33 Vict. c. 62. (1)

(1) 32 & 33 Vict. c. 62, s. 4, abolishes imprisonment for "default in payment of a sum of money" except (inter alia) "6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made."

By s. 5: "Subject to the provisions

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Anstie shewed cause. Before the Act no exemption from arrest existed in favour of married women; on the contrary, it was the universal practice, where there was judgment against husband and wife, whether as plaintiffs or defendants, and the wife was arrested, to discharge her only when she had no separate estate. (1) And when the wife was taken on a judgment against herself alone, she was not discharged, even though there was no evidence of separate estate: *Poole* v. *Canning*. (2) There is therefore no reason why the Act should not apply to married women. The defendant, not having pleaded coverture, is in the same position as the defendant in *Poole* v. *Canning* (2), who pleaded coverture and had it found against her, and if the Act does not apply she can be arrested, and will not be entitled to her discharge. Under the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93) ss. 13, 14, orders may be made on married women which will be enforceable by imprisonment. Secondly, the Act does not require proof of means on the making of an order for payment, but only on making an order for commitment. The order was made with reference to the dates at which it was proved there would be means.

Willis, in support of the rule. The whole section must be read together, and requires that no order shall be made without proof of means; there ought only to be one order, providing both for payment and for commitment in default.

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hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court. Provided (1) that the jurisdiction by this section given of committing a person to prison shall, in the case of any Court other than the superior Courts of law and equity, be exercised [subject to the restrictions therein mentioned] (2) That *such jurisdiction* shall only be exercised when it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same . . . For the purposes of this section any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order."

(1) See *Ivens* v. *Butler*, 7 E. & B. 159; 26 L. J. (Q.B.) 145; *Larkin* v. *Marshall*, 4 Ex. 804; 19 L. J. (Ex.) 161.

(2) Law Rep. 2 C. P. 241.

(a) SC 3 Jur. N.S. 384

[KELLY, C.B. It is the settled and proper practice to divide the order into an order for payment and an order for commitment. The "jurisdiction" mentioned in s. 5 is a jurisdiction to commit.]

The cases of the arrest of married women before the Debtors Act, 1869, were cases in which the party himself acted, the delivery of the writ to the sheriff being the act of the party and not of the Court; per Tindal, C.J., in *Newton* v. *Rowe* (1); but here the Court is asked itself to make an order committing the defendant. It is true a commitment is not asked now; but if, when it is asked for, the Court will refuse to make it, they will not now make an order which is useless except as a foundation for the other.

KELLY, C.B. This rule must be discharged. If married women are not within the Debtors Act, 1869, they remain subject to arrest and imprisonment; but it is quite clear the Act was intended to be of general operation, and to apply to every description of persons. The object was that there should be no imprisonment except for wilful default.

As to the remaining question, whether it is necessary before making an order for payment by instalments that the judge should be satisfied as to the existence of means at all, there is nothing in the Act imposing that condition. It may be prudent to do so, but it is enough that there is the judgment debt; afterwards, when an order for commitment is applied for, it will be time to shew the existence of means. In fact, however, the question of means was gone into carefully before the learned judge, and he has made a very reasonable and indulgent order with reference to the defendant's future income.

MARTIN, B. I am of the same opinion. The law has been correctly stated that the Court will only discharge a married woman when she is a party to the record as such. My opinion is that where an action is brought against her simpliciter, and judgment recovered, she cannot shew by any subsequent proceedings that she is a married woman. The order is quite right.

(1) 7 Man. & G. 329, at p. 333.

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BRAMWELL, B., concurred.

CHANNELL, B. It is clear from the previous practice that married women are not exempted from the operation of the Debtors Act, 1869; and to the other objection the answer is, that this is not an order for commitment.

Rule discharged.

Attorneys for plaintiff: *Vizard & Co.*
Attorney for defendant: *A. Drew.*

Nov. 25.

PHILPS, TRUSTEE *v.* HORNSTEDT.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *subs.* 2—*Fraudulent Conveyance.*

The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing and warehousing it, which he did, entering the brandy (at M.'s request) in his own name, and paying charges amounting to 47*l.* Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented to take M.'s acceptance at seven days' for a balance of account, including the hire and the 47*l.*, upon receiving M.'s authority to sell the brandy, if the bill were not met. This acceptance not being met, the defendant sold the brandy. The firm were afterwards adjudicated bankrupts, and the trustee sued the defendant in trover for the value of the brandy. The transaction was bonâ fide, but the brandy formed in fact the whole property of the firm:—

Held, that the transaction under which the defendant obtained power to sell the brandy was not a "fraudulent conveyance, gift, delivery, or transfer," within the meaning of the Bankruptcy Act, 1869, s. 6, subs. 2.

ACTION brought by the trustee in bankruptcy of the estate of McFarlane & Co. (a firm consisting of McFarlane, Henry, and Vernon) to recover the value of 600 cases of Bordeaux brandy. The first count stated a conversion by the defendant before the bankruptcy of goods of the bankrupt; the second count stated a conversion after the bankruptcy of goods of the plaintiff as trustee; the third count was for money payable to the bankrupt before the bankruptcy, for money had and received, and on accounts stated; and the fourth count for money payable to the trustee, for money had and received, and on accounts stated after the bankruptcy.

The defendant pleaded to the first two counts, respectively, not guilty, and denial of property; and to the third and fourth counts, never indebted; and to the third count, set-off.

The cause was tried before Mr. Hawkins, Q.C., at the Guildford Summer Assizes, 1872.

From the evidence then given it appeared that about the 17th of August a bill of lading for 600 cases of brandy was handed by McFarlane to the defendant for the purpose of landing and warehousing the goods, which the defendant did, warehousing them (at McFarlane's request) in his own name, and paying charges amounting to 47*l.*; that on the 29th of August a bill for 245*l.* given by the bankrupts for the hire of a ship called the *Iron Era*, of which the defendant was managing owner, and which was used by the bankrupts for carrying on their trade, falling due (1), an interview took place between McFarlane and the defendant, at which McFarlane asked the defendant to take his acceptance for the amount at fourteen days; that defendant having to meet a bill before the expiration of that time, declined this offer, and McFarlane then said, "You are perfectly secure; there are 600 cases of brandy, which are worth a great deal more than you want from me;" that defendant then said that, with the consent of others who were interested, he would give him seven days' credit; that on the following day he again saw McFarlane and Henry in company with a Mr. Bew; that McFarlane then said he had money coming from France, and that the proposed bill at seven days would be met; and in answer to a question by Mr. Bew, "whether he was solvent," he replied that "he had brought a great deal of money from America, and there was plenty more where that came from, and that he could not understand why defendant should make any question as he gave him the brandy as security;" that, after some discussion as to the value of the brandy, the defendant consented to take McFarlane's bill, saying that "he hoped the bill would be met, as he would be in a difficulty if he had to realize the brandy at the last moment, and that he would have to realize it at whatever it fetched if the bill were not met;" to which McFarlane replied, "You are at liberty to do whatever you like with the brandy;" that McFar-

(1) It was not clear upon the evidence whether the bill had actually matured or was just falling due.

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lane then gave defendant his acceptance at seven days for 302*l.*, the balance of an account then stated, and which included the amount due to defendant for landing and warehousing; that the bill was not met; that the defendant accordingly sold the brandy to Child & Co. for 175*l.*, from whom he afterwards repurchased it about the end of October for 225*l.*, and resold it for 357*l.*; that on the 12th of September a bankruptcy petition was filed against McFarlane & Co., founded on an act of bankruptcy committed on the 1st of September, and on the 12th of October the firm were adjudicated bankrupts.

The jury found that the transaction on the 30th of August was a bonâ fide arrangement, honestly entered into and honestly carried out, and they also found that the bankrupts had not on that day any other property besides the 600 cases of brandy.

The learned commissioner thereupon directed the verdict to be entered for the defendant, with leave to the plaintiff to move to enter the verdict for him for 400*l.*, the sum found by the jury to be the value of the brandy.

A rule having been obtained accordingly, or for a new trial on the ground that the learned commissioner should have told the jury that the plaintiff was entitled to the verdict,

Garth, Q.C., and *Grantham*, shewed cause. This was neither a fraudulent preference nor a fraudulent conveyance. The finding of the jury disposes of the first, and the admitted facts of the second. The defendant clearly had the brandy in his possession under a lien for 47*l.*, and all that he obtained by the transaction of the 30th of August was a right to sell. Such a transaction is not a "conveyance, gift, delivery, or transfer;" it is, therefore, not within the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, subs. 2. But if it were included in those words, it was not fraudulent even in a technical sense, the debtor not being deprived by it of the possession of his goods, and neither party at the time supposing it to be the whole of the debtor's property.

Prentice, Q.C., and *R. V. Williams*, in support of the rule. The question of whether an act is a fraudulent conveyance within the meaning of the bankruptcy law does not depend on whether the property transferred is known by the creditor to be the whole of

the debtor's property, but on whether it is so in fact. So with a fraudulent preference, where an intention to give a preference to the creditor must exist on the part of the debtor, this may be unknown to the creditor; à fortiori it is so with a fraudulent conveyance, where no design of delaying or defeating creditors need exist in fact, and it is sufficient if that is its necessary consequence. The cases of *Ex parte Hawker* (1) and *In re Wood* (2) shew that the law as to fraudulent conveyance is not altered by the new Act.

[BRAMWELL, B. There is no doubt about the soundness of those decisions; but is this a "conveyance, gift, delivery, or transfer"?]

It is. Even assuming the defendant had a lien (which is doubtful), he had no right to sell; and giving him that right was equivalent to transferring the property to him. It was, moreover, giving him possession in a different right—that is, with the right of holding and of selling, not only as against the 47*l.*, but as against the pre-existing debt for hire; and assuming that the mere super-addition of the power of sale to his original lien would not have made the act an act of bankruptcy, the addition of this further charge did so. *Woodhouse* v. *Murray* (3) shews that the fact that the debtor is already out of possession will not validate as against creditors a transfer of his whole property.

MARTIN, B. I think this rule should be discharged, and on two grounds. First, I think the defendant had a lien on the brandy in respect of money paid by him for its clearance, and until tender of the amount of that lien was made, the trustee was not in a position to sue.

Secondly, I think this was not an act of bankruptcy. The case of *In re Wood* (2) was a perfectly clear one; there was a conveyance properly so called, by which the debtor intentionally conveyed away to his creditor all his property. But if a transaction takes place in which there is no such intention on either side, but which afterwards turns out to have the effect of transferring the whole of the debtor's property, that is not a conveyance or transfer within the meaning of the statute. Here there was no conveyance,

(1) Law Rep. 7 Ch. 214. (2) Law Rep. 7 Ch. 302.
(3) Law Rep. 4 Q. B. 27.

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transfer, gift, or delivery; there was merely a power given to the creditor to hold property of which he already had, and was entitled to retain, the possession as against a debt due to him, neither party supposing it to be the whole of the debtor's property. Such a transaction is not within the terms of the Act.

BRAMWELL, B. I also think this rule should be discharged. It may be that the defendant's lien for 47*l.* would not alone have given him a defence; for if he had only a lien, he had no right to sell against the charge, and his doing so would be a conversion. But I mention the lien because it gave the defendant a right to possession; and that being so, what took place afterwards was not the giving of any further possessory right, but only giving the defendant a right to sell and pay himself out of the proceeds. What so took place cannot be either a "conveyance, gift, delivery, or transfer." It may be that if the case had been present to the minds of the legislature, they would have included it; the words "charge upon" would have been apt words for that purpose. They have not used any such words, and the words they have used do not comprehend the case. But I am not sure that the legislature did not have in their contemplation, and intentionally exclude such cases, that is to say, ordinary mercantile transactions, where, without any fraud, a creditor having in his possession goods belonging to his debtor, and subject to a lien for the debt, the owner requests him to sell the goods for their joint benefit, to pay himself out of the proceeds the amount due, and to hand over the balance to the owner. I think it was never intended that such a transaction should constitute an act of bankruptcy if it afterwards turned out that those goods were the whole property of the debtor.

But I further doubt whether, even if the Act had used the words "charge upon," a transaction of this sort, though relating to the whole property of the bankrupt, would have been fraudulent within the meaning of the Act. With what reason can it be said that there was here an assignment or charge without a present equivalent? The goods were already in the possession of the defendant, and subject to his lien, so that the bankrupt could not regain possession of them without paying the sum due. The bankrupt was also in difficulties about a bill in the defendant's

hands, which was just falling due, and the dishonour of which would be disastrous to his credit, and would besides cause the defendant to withdraw from him the ship, on the possession of which the carrying on of his business depended. Under these circumstances he makes the arrangement of which the defendant has taken advantage; that arrangement is not, in my opinion, "fraudulent" within the meaning of the Act (an expression always unfortunate when actual fraud is not meant), even if it were otherwise within its words.

CLEASBY, B. In this case an authority to sell was given by the bankrupt, in whom the whole property in the goods was vested, to the defendant, in whose possession they were, subject to a lien. Suppose all he had given was an authority to sell at the end of a week, without any further charge; could it have been said that this privilege, which the defendant did not possess before by virtue of his lien, was a "conveyance, gift, delivery, or transfer"? Clearly not. That is an answer to the first objection.

As to the other question, whether giving a right to sell for the further claim makes the transaction fraudulent within the Act, no authority has been referred to which shews it to be so; and we should be extending the construction given to the word "fraudulent" if we were to apply that term to such a case as the present. I think we ought not to do so; and the rule must therefore be discharged.

Rule discharged.

Attorneys for plaintiff: *Evans, Laing, & Eagles.*
Attorney for defendant: *Handson.*]

1872
Nov. 30.

[IN THE EXCHEQUER CHAMBER.]

MOUFLET *v.* COLE.

Measurement of Distance—"As the Crow flies," or by nearest mode of practicable Access—Covenant not to carry on Trade within a given Distance.

The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on business within half a mile if the distance were measured in a straight line, "as the crow flies," but not within half a mile if the distance were measured by the nearest mode of practicable access:—

Held (affirming the judgment of the Court below), that there had been a breach of the covenant.

APPEAL from the decision of the Court of Exchequer discharging a rule to enter a verdict for the defendant. (1)

The case was argued on the 21st and 22nd of June, 1872 (before Willes (2), Byles, Blackburn, Keating, Lush, and Brett, JJ.), by *Garth, Q.C.* (*A. L. Smith* with him), for the defendant, and by *Parry, Serjt.* (*F. Turner* with him), for the plaintiff.

Cur. adv. vult.

Nov. 30. The judgment of the Court (Byles, Blackburn, Keating, Lush, and Brett, JJ.) was delivered by

BLACKBURN, J. In this case the defendant by deed sold to the plaintiff the public-house called the "Lord Holland" and the goodwill of the business, and the defendant in the deed covenanted that he should not be in any way concerned in a public-house "within the distance of one half of a mile of the said premises called the 'Lord Holland'" during the plaintiff's occupancy.

At the trial before Martin, B., it appeared that the defendant did occupy a public-house so near the 'Lord Holland' as to make it a matter of controversy whether it was within the half mile or not. The judge was of opinion that the distance was to be measured "as the crow flies," and the verdict was entered for the plaintiff subject to the distance being measured, "such measurement to be made upon such principle as should be laid down by the Court

(1) Law Rep. 7 Ex. 70.

(2) Willes, J., died between the argument and judgment.

upon its final decision as to what was the true construction of the said covenant, leave being granted to the defendant to enter the verdict for him in the event of its being found by the said measurement, made upon the principle by the Court laid down, that the said public-houses are more than half a mile apart." The majority of the Court of Exchequer were of opinion that "the true construction of the language used is that a circle of half a mile radius is to be drawn round the 'Lord Holland,' and that if the defendant carries on the business of a publican within this space, he has broken his covenant." Cleasby, B., was of opinion that the distance was to be measured as a travelled distance, and to be measured "by the nearest available mode of access between the two houses."

There is a difference, though not generally of any consequence, between the distance as it would appear if measured on a map, without regard either to the curvature of the earth or the differences of level (if any such exist on the spot), and the distance in an actual straight line drawn from the one point to the other. The majority of the Court below have not noticed this; but, subject to some remarks which we shall afterwards make on this, we agree in their judgment.

We agree with what Parke, J., says in *Leigh* v. *Hind* (1)—that the parties to such an agreement do not contemplate the actual distance which a customer would have to traverse in going from one house to the other. No doubt their first object was to have protection for the custom of the purchased house by securing that the seller should not set up business so near to it as to affect the custom, and that would involve the consideration of how far the customers would have to travel; but as a covenant to that effect would obviously lead to constant litigation, they wish those who prepare their contract to lay down a fixed rule that will admit of no dispute. The words which they have used are to be construed in their ordinary sense, bearing in mind that such is their object. That object is best effectuated by measurement on the map; and we think the matter is now concluded by the balance of authority in favour of that construction. In *Woods* v. *Dennett* (2) Lord Ellenborough, in 1817, at nisi prius, laid down a rule con-

(1) 9 B. & C. at p. 779. (2) 2 Stark. N. P. 89.

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trary to this. In *Leigh* v. *Hind* (1), where there were two practicable modes of going between the houses, which were both less than the stipulated distance, and a third which was greater, the whole Court of King's Bench thought the contract broken; but Lord Tenterden and Littledale, J., assigned as their reason that the distance should be measured by the nearest mode of access, and Parke, J., that it should be "as the crow flies," which, of course, was shorter than either. At the time the weight of authority was probably in favour of the defendant's construction.

But then arose a series of cases: *Reg.* v. *Saffron Walden* (2) decided in the year 1846; *Stokes* v. *Grissell* (3), in 1854; *Lake* v. *Butler* (4), in 1855; *Jewel* v. *Stead*, (5) in 1856; and *Duignan* v. *Walker* (6) in 1857, which all adopted the other rule. It is true that most of those cases were on the construction of statutes, not of contracts. We do not, however, think that there is any sound distinction between statutes and contracts in this respect. In each the object is to substitute a certain distance, capable of easy determination, for a reasonable distance, which being uncertain, would be a trap for litigation. And the object of the draftsman who prepares either an Act of Parliament or a contract, where it is necessary to specify a distance, ought to be to use words that give a fixed and easily ascertainable guide.

In *Lake* v. *Butler* (4), Crompton, J., says: "If this question were quite new, the convenience would be all in favour of construing the distance as that measured in a straight line, and the words would be, to say the least, capable of bearing that construction. In common language, if you ask how far it is from one place to another, the answer often is, 'Do you mean by the road or by the fields, or as the crow flies?' But the recent authorities being all in favour of this construction, and the decision in *Reg.* v. *Saffron Walden* (2) being precisely in point, we ought to adhere to it at any rate, so that the legislature may know how such general words in an Act will be construed, and use them in that sense."

(1) 9 B. & C. 774.
(2) 9 Q. B. 76.
(3) 14 C. B. 678; 23 L. J. (C.P.) 141.
(4) 5 E. & B. at p. 99; 24 L. J. (Q.B.) 273.
(5) 6 E. & B. 350; 25 L. J. (Q.B.) 294.
(6) Joh. 446; 28 L. J. (Ch.) 867.

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Since that case there has been a further decision in the Queen's Bench of *Jewel* v. *Stead* (1); and a decision of Wood, V.C., in *Duignan* v. *Walker* (2), where he applies the same rule to a contract as we think should be applied. We, therefore, adopt as our own the judgment of Crompton, J., only slightly altering the last sentence. The recent authorities being all in favour of this construction, and the decision in *Duignan* v. *Walker* (2) being precisely in point, we ought to adhere to it, "at any rate so that parties framing a contract may know how such words in a contract will be construed, and use them accordingly."

It is to be observed, that the phrase used in the judgment of the majority of the Court below is, that "a circle of half a mile radius is to be drawn round the 'Lord Holland';" and Crompton, J., in the passage cited, uses the phrase "in a straight line." This, we think, would be understood by any one to mean that the circle is to be drawn and the line measured on a map; and this is, we think, the true meaning of the contract. It is a very simple matter to take the Ordnance map, and with a pair of compasses measure the distance between any two points, and then by the scale ascertain what that distance is. And we think this is what, in ordinary language, is meant when people speak of a circle round a particular point. But inasmuch as, in laying down a map it is treated as if the surface was projected on a plane, whilst in reality the surface of the earth is part of a very large sphere, and the surface varies in its level, this distance measured in an actual straight line between the points is not precisely the same as that measured on a map, or, as the legislature have expressed it in 6 & 7 Vict. c. 18, "the distance measured in a straight line on the horizontal plane."

In so short a distance as half a mile the difference arising from the curvature of the earth would not be more than a fraction of an inch, and may clearly be neglected as insensible. But that arising from the inequalities of the surface, though never great, may be perceptible. If, for instance, the distance measured on the map between two places was half a mile, and there was a difference in level of 130 feet, the actual distance in a straight line would be half a mile and a yard. But to ascertain this slight difference

(1) 6 E. & B. 350; 25 L. J. (Q.B.) 294.
(2) Joh. 446; 28 L. J. (Ch.) 867.

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it would be necessary to call in a surveyor, and incur trouble and expense. And we cannot think that people, in speaking of the distance round a point, do contemplate such minute accuracy. We think, therefore, that the distance should be measured on the map. It may be observed, that where in any case it is desired to adopt another rule, words can easily be used to express it, as was done in *Atkyns* v. *Kinnier*. (1)

One other point is to be disposed of. We think, in measuring the distance it should be taken from the nearest point of the one house to the nearest point of the other, without regard to where the doors are situated.

The judgment must therefore be affirmed.

Judgment affirmed. (2)

Attorneys for plaintiff: *Stileman & Neate.*
Attorneys for defendant: *Shum & Crossman.*

(1) 4 Ex. 776; 19 L. J. (Ex.) 132.
(2) Byles, J., concurred, solely in deference to authority.

THE GUARDIANS OF THE POOR OF THE WEST HAM UNION *v.* OVENS.

1872
Nov. 19.

Poor—12 & 13 *Vict. c.* 103, *s.* 16—*Valuable Security.*

A judgment is a "valuable security" within the meaning of 12 & 13 Vict. c. 103, s. 16.

APPEAL from the decision of the Judge of the Bow County Court, in an action brought by the plaintiffs to recover the sum of 19*l.* 19*s.*, the amount expended by them in the relief of the defendant, a pauper, and his wife and family, during twelve months prior to the proceedings in the action.

The action was brought under 12 & 13 Vict. c. 103, s. 16, by which it is enacted that, "where any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money, or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish, in the relief of such pauper during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof, as the case may be."

The defendant received from the plaintiffs relief for himself, his wife, and family, from October, 1867, to the 16th of May, 1872, inclusive. In October, 1867, before becoming chargeable, he was injured by an accident caused by the negligence of the St. Katharine Dock Company. He afterwards commenced an action against the company, which was tried at Westminster at the sittings after Hilary Term, 1872, and a verdict returned for 300*l.*, with leave to the company to move to enter a nonsuit or a verdict for them upon a point reserved. A rule was moved for pursuant to the leave reserved, but was refused, and judgment was signed on the 13th of May, 1872. The amount of the verdict and costs was paid to the now defendant's attorney on the 18th of May, and on the 20th 290*l.* was paid to the defendant by his attorney, being the amount of the verdict after deducting extra costs.

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GUARDIANS OF WEST HAM v. OVENS.

The plaintiffs applied to the defendant for payment of the above claim, and payment not being made, they brought this action. The learned judge gave judgment for the defendant, and the plaintiffs appealed.

Philbrick, for the plaintiffs. If on the 16th of May there had been only a verdict signed, there would have been more difficulty, a verdict could not be attached under s. 61 of the Common Law Procedure Act, 1854: *Jones* v. *Thompson* (1); and it might possibly have been argued that, on that ground, it was not a valuable security; but after the rule had been refused and judgment was signed, there was a debt which could be attached, and therefore clearly a valuable security for money. A judgment may also by 1 & 2 Vict. c. 110, s. 14, be made a charge on stock and shares, and might, till lately, have been made a charge on land under s. 13. (2) It will scarcely be denied that bonds or bills would be "valuable securities" within the meaning of the Act; but no reasonable distinction can be drawn between such personal securities and a judgment.

G. S. Griffiths, for the defendant. If a judgment debt may be called a valuable security because it can be attached under s. 61 of the Common Law Procedure Act, 1854, any ascertained legal debt will be included in the term, which will scarcely be argued. The meaning of the phrase is explained by the context, which speaks of "the produce of such security;" this shews that what is meant is a real security, which has a certain and intrinsic value. At least it must be such a security as can, like a bill or bond, be realised in the market.

Philbrick was not heard in reply.

KELLY, B. We ought to put a large and liberal construction on the Act, which was passed to prevent persons from looking to the parish for support, who have the means of supporting themselves. It would not be sufficient that before the relief ceased the pauper should be in a condition in which it is extremely probable that he will become entitled to money or a security for money; but here three days before the relief ceased he became absolutely entitled

(1) E. B. & E. 63; 27 L. J. (Q.B.) 234. 4 Jur. N.S. 338

(2) See now 27 & 28 Vict. c. 112, s. 1.

to the judgment in question—in the fullest sense of the word it "belonged" to him. The question then is, whether this judgment was a "valuable security" within the meaning of the Act? It is argued that this must mean a negotiable security, but that would be to cut down the words of the Act without reason. The judgment is undoubtedly a security for several purposes; it may be the subject of attachment, and may be made the foundation of a charge on property, and it is capable of being equitably sold and converted into money at any time until it is satisfied. There is certainly nothing in the facts of the present case to induce us to hesitate in holding the judgment to be a valuable security if we can properly do so, for the pauper has been supported for several years, during which he was prosecuting his claim for damages, and the sum of nineteen guineas is all that is now sought to be recovered. The judgment below must be reversed, and judgment must be entered for the plaintiffs.

CHANNELL, B. I am of the same opinion, for the reason given by the Lord Chief Baron. I am not sure that the verdict would not have been a "valuable security," though defeasible by reason of the leave given to move to set it aside. But, at any rate, when the rule to set it aside was refused, it was no longer subject to any doubt or uncertainty. I am of opinion that the judgment was a security within both the letter and spirit of the Act.

PIGOTT, B. I am of the same opinion. The judgment was certainly a security, and the facts shew that it was also a valuable security.

CLEASBY, B. I cannot hesitate for a moment in holding that the judgment was a valuable security; the difficulty is in finding any reasons why it should not be so held. It might have been assigned as a security for money borrowed, and would certainly then have been a security to the lender. Why, then, should we not say it was also a security in the hands of the pauper?

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Hilleary & Tunstall.*
Attorney for defendant: *Smedley.*

1872 MORRISON *v.* THE UNIVERSAL MARINE INSURANCE COMPANY.

Feb. 8.* *Marine Insurance—Concealment—Knowledge of Underwriter—Election—Delivering out Policy.*

The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria* without disclosing to the defendants certain information in his possession, which it was material that they should know (October 10). In so doing he acted in good faith, supposing, from inquiries that he had made, that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 13) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14 or 15). Upon receiving news of the loss of the vessel they gave notice to the plaintiff that they did not consider the policy binding on them (October 20). On the trial of an action upon the policy the learned Judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion, whether the defendants had elected to go on with the policy:—

Held (Cleasby, B., dissenting), a misdirection, on the ground (by Martin, B.) that if the conduct of the defendants in delivering out the policy would induce the plaintiff to suppose that he had a valid policy, they were estopped from denying it; (by Bramwell, B.) that delivering out the policy with knowledge of the concealment was primâ facie an election, and threw on the defendants the burden of shewing circumstances to explain it.

The information not disclosed by the broker had appeared in *Lloyd's List*, which is a daily newspaper containing hundreds of entries relating to shipping in all parts of the world, and circulating among shipowners, underwriters, and insurance brokers; the defendants were in fact subscribers to this newspaper:—

Held, that the broker was not entitled to assume a knowledge by the underwriters of the contents of *Lloyd's List*.

THIS was an action brought on a policy of insurance for 500*l.* on the chartered freight of the ship *Cambria* (which was totally lost), effected with the defendants by Previté & Greig as brokers on behalf of the plaintiff.

The defendants pleaded (1) fraud, (2) misrepresentation of a material fact, and (3) concealment of material facts.

The cause was tried before Blackburn, J., at the Liverpool Winter Assizes, 1871, and the following facts were proved:

The plaintiff is a merchant trading at Liverpool, and the defendants are an insurance company carrying on business in London.

* Decided at the sittings after Hilary Term, 1872.

The plaintiff was sole owner of the ship *Cambria*, which sailed from Bahia on the 18th of August, 1870, for New Orleans, under instructions to call at the South-West Pass for orders.

The South-West Pass is one of the passes into the Mississippi; it is at some distance below New Orleans, and is a place of call for orders for vessels going to load at the cotton ports of the Gulf of Mexico.

On the 9th of September, 1870, the plaintiff entered into a charterparty with McMahon & Co., of Galveston, merchants, by which the *Cambria* was to proceed to the South-West Pass for charterer's orders, and thence to Galveston in Texas, New Orleans, or Mobile, and there take a full cargo of cotton for Liverpool.

On the 3rd of October the *Cambria* arrived at the South-West Pass, where the master received orders from the charterers to proceed to Galveston, and on the next day he sailed for that port. On the 6th of October the vessel arrived off the harbour of Galveston, and got ashore on the North Breakers off the entrance of the harbour, and was there totally lost.

On the same day (October 6) the master sent to the plaintiff from Galveston the following telegram:—"Ship *Cambria* ashore near here, full of water, lost." The telegram was received at Liverpool post-office at 5.30 P.M. on the 7th of October; but the plaintiff denied having ever received it, and on this issue the jury found in his favour.

On the 6th of October E. P. Hunt, the agent at Galveston of Lloyd's Liverpool and London Underwriters' Association, and of the Marine Board of Underwriters of New Orleans, sent the following telegram to the agent for Lloyd's at New York:—"Ship *Cambria*, Owen, master, of Jersey, from Bahia, S. America, ballast, ashore, North Breaker, probably lost."

On the 7th of October a telegram was received by Lloyd's, London, from the agent for Lloyd's at New York, in consequence of which the following announcement was made the next day in *Lloyd's List*: "New York, 6th October.—The *Cambria* (probably *Cameo*), from New Orleans, grounded on North Breaker."

On receipt of this telegram the following telegram was forwarded by Lloyd's to Liverpool, and was entered on the loss-book at the rooms of the Underwriters' Association at Liverpool

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at thirty-nine minutes past noon on the 7th of October: "*Cambria*, qy. *Callao*, from New Orleans, aground North Breaker."

The plaintiff is not a member of or a subscriber to the underwriters' rooms, to which only subscribers or members are admitted.

After making the above entry in the loss book, Dick, the secretary to the Liverpool Lloyd's Association, searched Lloyd's Lists, and about an hour after making the entry, he added at the foot of it the following words in parenthesis: "(Memorandum, *Cambria*, Owen, 1177 tons, left Bahia 18 Aug. for New Orleans)."

On the same evening, at the hour for closing the rooms to subscribers, the secretary, according to his usual custom, sent for publication to the *Liverpool Mercury* a copy of the despatch first received from Lloyd's, but added the word "Qy." after the words "New Orleans;" so that the publication among the shipping news of the *Mercury* of Saturday, 8th of October, was in these words: "*Cambria*, qy. *Callao*, from New Orleans, qy. aground North Breakers."

Not being able to find anything about a ship named *Callao*, he had telegraphed the same day to the London Lloyd's, to inquire into the meaning of the words "Qy. *Callao*," and received at 5.30 p.m., after the rooms were closed, the following answer: "*Cameo*, from New Orleans, is supposed to be the name of the ship aground on the North Breaker."

After receiving from Lloyd's, London, the answer above set forth, the secretary searched Lloyd's Lists, in order to ascertain something about the ship *Cameo*, and then made the following entry in the loss-book: "The vessel on the North Breaker reported yesterday as the *Cambria*, is stated to be the *Cameo*, from New Orleans. Memorandum:—The ship *Cameo*, from Antwerp, arrived at New Orleans on the 26th September."

This entry was also sent to the *Mercury* on the morning of Saturday, the 8th, and was published in that paper on Monday, the 10th of October.

The secretary stated, on cross-examination, that he added the above memorandum as being, in his opinion, tantamount to a statement that the ship on the North Breakers could not be the *Cameo*, "because," he said, "the *Cameo* having arrived on the 26th of September, she could not have got her cargo discharged and loaded,

and come out again to be lost on the 6th." He did not, however, in any way communicate with Lloyd's in London that he had come to this conclusion.

On Saturday, the 8th of October, the plaintiff, who, up to that time, had no insurance on the *Cambria* or her freight, wrote from Liverpool orders to Messrs. Previté and Greig, of London, insurance brokers, to effect insurance for 5000*l.* on the ship, and 5000*l.* on chartered freight.

The plaintiff bought a copy of the *Liverpool Mercury* of the 8th of October, but he swore that he did not see the entry above mentioned until his attention was called to it at his own house late in that afternoon, after the letter of the 8th had been posted. The plaintiff also bought a copy of the *Liverpool Mercury* of the 10th of October, on his way to his office, where he went earlier than usual, in consequence of the announcement in the *Mercury* of the 8th.

Immediately on his arrival at his office, he sent to his brokers the following telegram: "Since writing Saturday, paragraph in *Mercury*, '*Cambria*, quære *Cameo*, from New Orleans, aground on North Breaker.' To-day's *Mercury* says: 'The vessel on the North Breaker, reported yesterday as the *Cambria*, is stated to be the *Cameo*, from New Orleans.' Can you find out at Lloyd's? let me know by wire before acting." And later, on the same day, he wrote to his brokers a letter in which, after quoting the above telegram he said, "It is our impression that it cannot be the *Cambria*, or our captain would certainly have telegraphed us, and we have received none. If it is not the *Cambria*, should like the insurance done on good terms, as she is rather long on the voyage. We have sent you all the particulars we have received, and must leave you to act as best for our interest. She may have been detained on the line, but have not seen her spoken, which makes us uneasy. All we know is, the above extracts from *Liverpool Mercury* newspaper, sent you at once by telegram, and are waiting any information you can give us about her from Lloyd's. Your telegram to hand, as under, 'Vessel on North Breakers appears to be *Cameo*, and not *Cambria*,' to which we replied by wire—Your telegram received, and a great relief; nevertheless, have been so frightened that we wish insurance done on the best terms. We will not run a yard if not insured any more."

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No information was given to the underwriters of the memorandum published in the *Liverpool Mercury* of the 10th of October at the end of the telegram.

The letter of the plaintiff of the 8th of October, with the captain's letter from Bahia, announcing the *Cambria's* sailing, and the charterparty, and the plaintiff's telegram of the 10th of October, were received together by the brokers on reaching their office on the morning of October the 10th, and Previté immediately went to Lloyd's for the purpose of searching the books, and endeavouring to ascertain whether the vessel reported to be lost was the *Cambria* or the *Cameo*.

By referring to the index books at Lloyd's, which contain an index to the entries in *Lloyd's List*, Previté discovered the announcement published there on the 8th of October, as above stated.

Lloyd's List is a daily shipping gazette, containing several hundreds of entries giving the shipping news from all parts of the world. These gazettes are received every morning by underwriters, and were actually received by the defendants.

Previté also searched at Lloyd's for information about the ship *Cameo*, and found that there was news of her arrival at New Orleans on the 26th of September; and not finding any news of the *Cambria* at New Orleans, or at the South-West Pass, as was to be expected if she had arrived there, he concluded that the vessel reported to be ashore on the Breakers must be the *Cameo*, and not the *Cambria*.

Previté having come to this conclusion, applied on behalf of the plaintiff to various underwriters on the 10th, 11th, and 12th of October for insurance. He took in his hand the captain's letter and the charterparty, and stated to the underwriters when and from where the vessel sailed, and what the voyage was. Beyond this he gave no information to the underwriters, being convinced, as he said on cross-examination, that the vessel ashore was the *Cameo* and not the *Cambria*. It was conceded that he acted throughout in good faith.

On the 10th of October he effected with underwriters, other than the defendants, insurance on the freight for 1350*l*., at a premium of six guineas per cent.; and on the same day he exhibited to Mr. Fisk, the defendants' underwriter, the slip initialed at a

premium of six guineas per cent., and proposed that the defendants' company should take a line on the freight at the same rate. Fisk, after hearing from Previté that insurance on the vessel was also desired, declined to insure the ship at all, but offered to take a line on the freight at eight guineas premium.

On the 11th of October, Previté effected further insurance on behalf of the plaintiff on the freight at eight guineas per cent.

On the 12th of October, he proposed to Mr. Pritchett, the defendants' assistant-underwriter (Mr. Fisk being then away), to take a line on the freight at 8 guineas per cent., stating that Fisk had given him a quotation at that rate; and Pritchett, without asking for or receiving any information from the broker beyond the date of the sailing of the vessel, and the facts stated in the slip hereinafter mentioned, initialed the slip on behalf of the defendants for 500*l.* on the chartered freight.

The same day, and soon after having initialed the slip, Pritchett went to Lloyd's rooms, and there saw in the loss-book (which lay open on the stand where it is always kept open for the information of all visitors to the room) the above-mentioned announcement from Lloyd's agent at New York. This entry should, in ordinary course, have been made in the loss-book on the same day as it appeared in *Lloyd's List*, viz., on the 8th of October, but it had not, in fact, been entered till that morning.

Immediately on reading this entry, Pritchett, seeing Previté in the room, accosted him and said, pointing to the loss-book, "This looks uncommonly like the *Cambria*, which I have just written for you." Previté replied (according to Pritchett's evidence) "I know all about this; this is the *Cameo*," or (according to Previté's own evidence), "I have known about that for some days, and I do not think anything of it."

Pritchett then went with Previté, and was shewn by him the entries which Previté had examined as stated above.

It was conceded that in effecting marine insurances, until the slip is initialed the matter is considered as merely in negotiation. When initialed, the contract is considered concluded. It was proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialed.

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On the 13th of October Fisk returned to London, and was immediately informed by Pritchett of all that had taken place between himself and Previté. Fisk stated that he was the person whose duty it would be to determine, on ascertaining that there had been a concealment, whether the defendants would carry out the insurance.

The course of business as to issuing policies in the defendants' office, is as follows: the business of the office is conducted in two departments, one of which is the underwriting department, and the other that of the secretary and adjuster of claims. After slips are initialed in the underwriters' department they are passed into the secretary's department, and thenceforward the underwriters' department has nothing further to do with them. All the slips taken are forthwith given to the policy-writers, and the head of the policy-writers obtains the necessary stamps, and the policies are then filled up on the proper stamped forms. This work usually occupies about two days, that is to say, on the day but one after the slips are initialed the policies are signed by the directors, and are then placed in pigeon-holes under the letters of the alphabet in the outer office for delivery. The policies are always dated as of the day of the date of the slip, no matter what delay may occur in filling up the policies.

In this case a policy was filled up according to the tenor of the initialed slip. It was dated on the 12th of October, 1870, but not executed by the directors until the 14th or 15th; and having been deposited in the pigeon-holes, was taken away by a clerk of the broker's on the 14th or 15th of that month.

On the 19th of October a telegram was received and posted on the loss-book at Lloyd's, shewing unquestionably that the vessel lost on the North Breakers was the *Cambria*, and on the 20th a notice was given by the defendants to the brokers, stating that they held themselves free from liability on the policy.

The defendants had made no objection or protest between the date of initialing the slip and sending this notice to the plaintiff.

The premium, though at once debited to the broker, would only become payable on the 8th of November; it was tendered by the broker, on behalf of the plaintiff, in due time, but the defendants refused to receive it.

At the trial various defences were set up, a main contention being that the plaintiff had received a telegram from the captain announcing the loss, before directing his brokers to insure on the 8th of October.

The direction of the learned Judge in his summing up, so far as is material to this case, was as follows: "When he hears that there has been concealment, the underwriter is not bound to say, 'I will put an end to the policy,' but he has a right at his election to say, 'You have been guilty of a concealment which would entitle me to determine the policy, but I prefer to go on with it;' he has what lawyers call the right of election, but he cannot say, 'I elect to go on,' and then when he hears that there is a loss say, 'Now that I hear there is a loss I will not recognise the policy.' . . . Now comes the third and last question, which I pointed out to you before. I told you that when a man discovers that there has been a misrepresentation of that sort, he cannot keep the contract and get rid of it too. He has a right to say, 'Take back your premium and make the contract a nullity.' He has also a right to say, 'You have done what has entitled me to get rid of the contract, but I will keep the premium and go on.' He has a perfect right to do either of those things, and when he has got notice of the concealment he is bound to make his election within a reasonable time; he is not bound to do it with desperately hot speed. A man cannot wait to take his chance, he must elect within a reasonable time."

After examining the evidence, the learned judge proceeded:— "Now Mr. Fisk is the man who determines on these returns of premium. He knows on the 13th of October of all this, as far as this non-disclosure goes. He was aware of the fact, and that he might have returned the premium, or had a right to say he would return the premium; and returning the premium would say he was not liable. No doubt if he had offered to return the premium, Mr. Previté's answer would be, 'I will not take it,' but still Mr. Fisk had no right to continue to hold the premium; he could not play fast and loose; he must either adopt it or refuse it. A good deal has been said about the slip and the stamped policy. I think as regards this part of the case it makes no difference whatever. I believe (you know better than I do) it has

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been quite correctly stated that the putting it on the slip is considered in fair dealing and mercantile understanding, as being the contract, as if it were made on that day. This would equally apply if the contract had actually issued as a stamped policy. . . . The defendants knew of the fact, and did not do anything, or take any step, until the news of the loss came. Then the third question of this defence comes to be, do you think that they, having this opportunity (taking into account that they should make the election within a reasonable time) had elected to go on with the contract? If so, that puts an end to the defence. On this I express no opinion at all. I leave this entirely to you."

Four questions were left to the jury by the learned judge, and were answered by them as follows:—

First. Did the plaintiff receive the telegram addressed to himself from Galveston by the master, John Owen? No.

Second. Was it material to the underwriters in calculating the premium, or determining whether to take the risk, to know of the telegram which arrived and was in *Lloyd's List* and the *Mercury*? Yes.

Third. Had the broker a right to suppose that the underwriters were acquainted with the contents of *Lloyd's List*? No.

Fourth. Did the defendants' company, after knowledge that the broker had not disclosed this fact, elect to treat the policy as subsisting? No.

The learned judge thereupon directed the verdict to be entered for the defendants on all the pleas except that of fraud.

A rule nisi for a new trial was afterwards obtained, on the ground of misdirection on the part of the learned judge in not telling the jury that the defendants were to be presumed to know the contents of *Lloyd's List*, and that the plaintiff was not bound to communicate information contained in them; and also that on the facts proved with reference to the execution of the policy, without protest, after knowledge of the alleged concealment, the learned judge ought to have directed the jury to find for the plaintiff; and on the ground that on the question of election the verdict was against the weight of evidence.

Feb. 4, 6, 7. *Butt, Q.C.*, *J. R. Mellor*, and *Benjamin*, shewed

cause. First, the non-communication by plaintiff to his broker of the memorandum in the *Liverpool Mercury* of the 10th of October was a material concealment, and this fact was relied on by the jury. Secondly, there was a material concealment by the broker. The underwriter is entitled to know the facts known to the broker, and to exercise his own judgment upon them; by keeping silence the broker compelled the defendants to accept his own conclusion. The non-disclosure of facts merely suggesting the inference that the ship may be lost, has been held sufficient to avoid a policy: *McAndrew* v. *Bell* (1); in *Court* v. *Martineau* (2), where the policy was upheld, no such inference could reasonably be drawn. Thirdly, the concealment was of information which the underwriter could not be expected to know. The fact that intelligence is announced in *Lloyd's List* cannot affect underwriters with constructive knowledge of it; this would impose on them the duty of knowing the whole contents of the paper. It is a question of fact; and whatever may have been the force of the inference in former times, it is impossible now to say, as a matter of law, that an underwriter is acquainted with and carries in his head all the vast variety of details which it contains. In *Proudfoot* v. *Montefiore* (3), it was not even argued that the underwriter had constructive notice of news of the loss of the insured ship which was contained in *Lloyd's List*. The early cases which seem to lay down a contrary rule only shew (and in this they probably go too far) that *Lloyd's Lists* are primâ facie evidence of the underwriter's knowledge: *Friere* v. *Woodhouse* (4); if he is misled by the broker, the insurance is void, although the news may have been accessible to both alike *Mackintosh* v. *Marshall* (5); and he is at least as much misled by silence as to a telegram which announces the loss of the vessel insured, as the underwriter was by silence as to the identity of the vessel insured with a notorious cruiser in *Bates* v. *Hewitt* (6). The question is one for the jury, and was rightly left to them: *Gandy* v. *Adelaide Marine Insurance Company*. (7) Fourthly, it was never the intention of either party to insure the *Cambria*,

(1) 1 Esp. 373.
(2) 3 Doug. 161.
(3) Law Rep. 2 Q. B. 511; see note at p. 518.
(4) Holt, N. P. 572.
(5) 11 M. & W. 116.
(6) Law Rep. 2 Q. B. 595.
(7) Law Rep. 6 Q. B. 746.

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if she were the vessel on the rocks. It was because Previté had satisfied himself that she was not the vessel on the rocks that he insured her. What passed at the time of effecting the insurance, tacitly and in the broker's own mind, and what took place afterwards more expressly, had relation only to the contingency of the *Cambria* not being the vessel on the rocks, and limited the insurance to that contingency. There is therefore no identity between the vessel insured and the vessel *Cambria* which actually was upon the rocks, *Ionides* v. *Pacific Fire and Marine Insurance Company*. (1) Fifthly, even supposing the last point not to hold, and the policy to be capable of ratification by defendants on discovery of the concealment, it was never ratified. The giving out of the policy was a mere formal act, the slight importance of which is shewn by *Xenos* v. *Wickham*. (2) The true contract is made by the initialing of the slip; the slip is the contract, although the policy is the evidence; the issuing of the policy is merely the completion of an act which the underwriter is morally bound to complete. This is shewn by *Cory* v. *Patton* (3), in which it was held that the non-communication of information received by the assured after the ship was initialed, but before the execution of the policy, did not invalidate the policy; and the decision in *Mackenzie* v. *Coulson* (4) was shewn to be founded on the error of supposing the statutes there relied on to be still law. An act which is to operate as an election to affirm a voidable contract must be clear and unequivocal, not such as will equally bear another construction: *Clough* v. *London and North Western Ry. Co.* (5) Here no act was done of that character. The only act that can be relied on is the giving out of the policy; but the combined effect of *Xenos* v. *Wickham* (2), *Cory* v. *Patton* (3), the stamp laws, and the usage of underwriters, is that the underwriter who has initialed the slip is under a moral obligation to execute and deliver out the policy in order to enable the assured to try the question of its validity, since to do otherwise would be to decide the case in his own favour, and to prevent an appeal by the assured to an impartial tribunal; that the execution is only of

(1) Law Rep. 6 Q. B. 674.
(2) Law Rep. 2 H. L. 296.
(3) Law Rep. 7 Q. B. 304.
(4) Law Rep. 8 Eq. 368.
(5) Law Rep. 7 Ex. 26.

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importance because of the stamp laws, and that the mere delivery of the policy is a formal act of very little consequence. There was therefore nothing in these acts equivalent to an election to affirm the contract; nor can any authority be produced shewing that the underwriter is bound to make any election until he is called upon to pay.

Holker, Q.C., Herschell, and *M'Connell,* in support of the rule: First, the memorandum of the 10th of October never went to the jury. Second, there was no concealment by the broker, because he was entitled to suppose that the defendants' underwriter was already possessed of the information contained in *Lloyd's List.* Acquaintance with the contents of *Lloyd's List* had been constantly assumed on the part of the underwriter: Arn. Mar. Ins. vol. i. p. 530 (4th ed.); *Mackintosh* v. *Marshall* (1); *Friere* v. *Woodhouse.* (2)

[MARTIN, B. Notwithstanding the learned Judge's expression of opinion in that case, the question was left to the jury.]

The assured is not bound to communicate what the underwriter ought to know, or may be presumed to know: *Carter* v. *Boehm* (3); *Lee* v. *Jones.* (4) It is sufficient, therefore, if the announcement of the fact in *Lloyd's List* is primâ facie evidence of the knowledge of the underwriter; for what a jury may in the absence of contrary evidence presume the underwriter to know, the assured may also presume him to know. Thirdly, there is no question here, as in *Ionides* v. *Pacific Fire and Marine Insurance Company* (5), of the identity of the vessel; the question is only whether a fact relating to the *Cambria* was not disclosed, which is the ordinary case of concealment. Fourthly, assuming that there was a concealment, the defendants' underwriter was fully informed of the whole facts, at least as early as the 13th of October. The policy was then neither delivered out nor executed. It was the duty of the defendants, on knowing the facts which entitled them to elect, to signify their election, and the jury ought to have been directed that any act done by the defendants after that time, treating the insurance as valid, affirmed the contract and determined their right of

(1) 11 M. & W. 116.
(2) Holt, N. P. 572.
(3) 3 Burr. 1905; 1 W. Bl. 593.
(4) 17 C. B. (N.S.) 482; 34 L. J. (C. P.) 131.
(5) Law Rep. 6 Q. B. 674.

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election. Going on with the contract by executing and delivering out the policy was such an act. It was an act which could only be construed in one way. Even if the policy had been executed, *Xenos* v. *Wickham* (1) does not shew they would have been bound to deliver it out, or that it belonged to the assured, if they were entitled to rescind on the ground of fraud or concealment. But it had not been executed, and the defendants were certainly not bound to give legal effect to a contract which, if it had been completed, would not have bound them. Assuming, however, that by the practice of underwriters they had considered themselves honourably bound to execute and deliver out the policy, yet since that was an act which, if done in silence, would induce the plaintiff to suppose himself insured, they were bound then at least, if not before, to express their intention to avoid the policy on the ground of concealment. By keeping silence they altered the plaintiff's position, and prevented him from insuring elsewhere. If this were otherwise, the case of a holder of a policy, voidable by reason of an innocent concealment, would be worse than that of one whose contract was voidable for fraud; for in the latter case an election is clearly made by any act done under the contract, after knowledge of the fraud.

Cur. adv. vult.

Feb. 8. The following judgments were delivered:

MARTIN, B. I am of opinion that there must be a new trial in this case. The first point was, whether there was a material concealment by the plaintiff himself in not communicating to his broker the memorandum which appeared in the *Liverpool Mercury* on Monday, October 10th. In my opinion this fact was very important, and, if established, would be a material concealment which would avoid the policy; but it seems to me that this point was not brought before the jury in such a way as to justify us in upholding their verdict on that ground.

The second point relates to the concealment by the broker, and we have no doubt that there was a concealment. It was argued that, by reason of the fact appearing in Lloyd's List, the underwriter is not in condition to take advantage of the non-communica-

(1) Law Rep. 2 H. L. 296.

tion by the broker. But we are satisfied that this is a question of fact, and that it cannot be assumed as a matter of law that the underwriter saw everything that was contained in that paper. The question was, therefore, rightly left to the jury.

But a third question now arises, which is of very serious importance. The fact is, that certain material telegrams had been communicated to the broker who effected the insurance which he did not communicate to the defendants' underwriter; and we may take it that the reason of this was, as he stated, that he had examined the matter and had satisfied himself that the ship upon the reef was not the *Cambria*. But however that may be, the fact became known to the underwriter shortly after he had initialed the slip, and then, without any intimation that they looked upon it as of any importance, or intended to dispute their liability, the defendants signed a stamped policy and delivered it to the plaintiff. The question is, whether they are now at liberty to say that they are not bound by the policy, on the ground of concealment; and my impression is that they are estopped. If the underwriter, after having acquired a knowledge of the fact of the concealment, gives out a policy without notice, and as if it were binding on him, he does that which would induce the assured to think that he had a valid policy, and to seek no further for insurance. He cannot be allowed to wait until a loss has occurred, and then elect to rescind, when his own act has put the assured in a condition in which he can no longer insure himself anywhere. I cannot but think that the manner in which the question was dealt with by the Lord Chief Baron (1) was more correct, and that the proper direction to the jury would be, that if the defendants, by delivering the policy to the plaintiff and retaining the premium, or not rescinding the contract for the premium, would naturally lead the plaintiff to suppose that the policy was delivered to him as a binding contract, that will preclude them from afterwards averring the

(1) At a previous trial of this cause, before the Lord Chief Baron, at the Liverpool Summer Assizes, 1871 (when the jury were discharged, being unable to agree on a verdict), the learned judge directed the jury that the slip constituted a contract, but that the defendants having, between the signing of the slip and the issuing of the policy, become acquainted with the telegrams not communicated by Previté, they ought at once to have made a communication to the assured, and refused to issue a policy.

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contrary. In my opinion, therefore, there must be a new trial.

BRAMWELL, B. I come to the conclusion that this rule should be made absolute with great reluctance, for, upon the whole, I think it probable that justice has been done. But as to the first point, I agree with my Brother Martin (and my Brother Blackburn has also stated to me that he concurs in this view), that the question of the memorandum was not left to the jury, and that they have not expressed any opinion upon it.

Then the question arises as to the concealment by the broker. And I am of opinion that there was a concealment of what it was material that the underwriter should know, and which he did not know. Upon this point, the argument of the plaintiff was that it was not a concealment, on the ground that the underwriter was bound to take notice of the contents of *Lloyd's List*, or, in another way of putting it, that the broker was entitled to assume that the underwriter knew it. I do not agree with that argument. It is impossible to say that there is any rule of law, or any principle or authority, which affects the underwriter with knowledge of what is contained in *Lloyd's List*. No doubt some knowledge may be assumed in the underwriter; what, I will not attempt exactly to define or describe, though I agree with what was thrown out by my Brother Cleasby in the course of the argument, that the matters he must take notice of are matters of general knowledge, not matters relating to any particular ship. But to hold that the underwriter is bound to carry in his head all that is contained in *Lloyd's List* relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and needless burden on the underwriter, while the opposite view puts no difficulty at all in the way of the owner. There was, therefore, a material concealment.

But the next question then arises, whether, if the underwriter becomes aware of the concealment after the slip is issued and before the policy is signed, you may look at the time of initialing the slip as the time when the rights of the parties are fixed. I think, independently of authority, that you can do so; and I have a strong opinion that you could do so in any conceivable state of

the stamp laws, for the question does not relate to the document, but to a period of time not mentioned in the document. There is nothing repugnant to the contract in it. Without using any doubtful or contested terms, such as condition, the obligation of the underwriter is undoubtedly affected by what does not appear upon the policy. If at the time of making the policy a matter which is material is concealed, it defeats the policy; the written obligation is, therefore, controlled by something not appearing on its face. But if so, you may as well put the time with reference to which the concealment is to operate at any previous period, as at the instant of executing the policy. There is no more addition or contradiction in the one case than in the other. But there is also authority for this. The case of *Cory* v. *Patton* (1), in the Queen's Bench, is decidedly in point; it was there held that the assured was not bound to communicate a matter of which he became aware after the slip was initialed. On what ground? On the ground that the initialing of the slip was the time at which the rights of the parties were fixed. Therefore the defendants are at liberty to shew that before signing the slip they did not know a matter that ought to have been communicated to them, although before executing the policy they did.

But now comes a matter in which there is great difficulty, and as to which I cannot agree with my Brother Blackburn's ruling at the trial. After the slip was signed, it seems on the same day, the defendants became aware of the concealment of the telegram; and they then knew that the contract was not binding on them. It then became not only their right, but I think also their duty, to say, within a reasonable time, either "We find that there has been a material concealment, and we elect to avoid the policy and to return the premium;" or, "We will retain the premium, and elect to go on with an insurance which is not at present enforceable against us." This would have been so if they had delivered out the policy at the time when the slip was initialed; and it must be equally so though the policy was not given out. If they did not do this within a reasonable time, the contract became binding upon them. It is a general principle of law, founded both on justice and authority, that even in cases of fraud, when a man has notice of

(1) Law Rep. 7 Q. B. 304.

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any matter which gives him a right either to insist upon a contract or to treat it as void, he must say within a reasonable time whether he determines to go on or to avoid it; and the observation is a forcible one that if the principle were not applicable in this case, a man would have greater power under an innocent than under a fraudulent concealment. Now it seems to me that where the transaction consists of several acts, when the time arrives for taking the next step in furtherance of the contract, then is the time, either as a matter of right in itself, or because it is the natural and reasonable time, for the party who is to take the next step to declare his election. In effect the contract here, whether enforceable or not on the ground of the Stamp Acts, was, "I will become your insurer, and will give you out a policy; but if I discover at any time that there has been a material concealment, I have the right either of avoiding, or of going on and keeping the premiums. It is my right; I have the option to go on or not." Then when the time came for the defendants to take the next step they ought to have declared their election, and if they took that step in furtherance of the contract without intimating that they did not waive their right to treat the contract as void, the plaintiff was entitled to treat it as a notification to him that they had elected not to avoid the contract, but to go on. So that, in my judgment, the defendants ought to have said, "We shall not give out the policy." If the plaintiff had then said, "That is not fair; I deny the materiality of the concealment, and will contest the point;" they might have said, "Well, then, we will give out the policy, but we deny its validity;" and if they did not make such a statement, the assured would be entitled to treat their conduct as an election not to avoid.

It was said in answer to this, that giving out the policy was a thing they could not avoid, because *Xenos* v. *Wickham* (1) shewed that the policy was the property of the assured from the time of its execution. Now, *Xenos* v. *Wickham* (1) did not shew that it would be so if the policy was void on the ground of concealment. But, allowing the answer, it only alters the form of the objection, because, instead of saying that the policy ought not to have been given out, we must then say that it ought not to have

(1) Law Rep. 2 H. L. 296.

been executed. It is said, however, that those who executed it had no authority to do so. But that is not so. The clerks in the office had nothing to do with the underwriting, but they were clerks who were told to make out policies in accordance with the slips; and if it was intended to revoke their authority, they should have been told not to make out this particular policy. But, further, the policy was signed by the directors, and they had authority to issue the policy or to take the objection. In short, before execution, the matter must have come before officials who had power to tell, and who should have told the clerks not to make out the policy, or who should have refrained from executing it; or if the policy had been executed and had, according to *Xenos* v. *Wickham* (1), vested in the plaintiff, then they should have delivered it out with a protest.

But what I understand to be my Brother Cleasby's difficulty is this: it is said the delivery was a thing they could not help, and how can a man elect by an act which he does under compulsion? A proposition so stated it is difficult to deal with. In one sense, however, it was not under compulsion. It was done by the defendants as people of honour; but as people of honour they might do it under a qualification; they might say, "We do it as a matter of fairness, but at the same time we maintain that it is not binding in point of law and right." In short, they may do it under such circumstances as will not cause them to lose their right. As to considerations of how the matter would stand if the transaction occurred in some place where there were no stamp laws, and if after a verbal engagement a slip or policy were executed, or a premium received with knowledge of a concealment, it is only the same question in another form; if an act is done in furtherance of an invalid contract, it ought to be accompanied by a statement that it is not to be taken to admit that the contract is valid. Therefore, when the time arrives for giving out the policy, or, if *Xenos* v. *Wickham* (1) applies, for executing it, the underwriter should either refuse to do so, or, if the plaintiff insists on his right to have the policy and try the question, it should be given with an intimation that the underwriter elects to avoid.

I do not, however, feel so confident upon this that I should

(1) Law Rep. 2 H. L. 296.

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myself rule, or advise any judge to rule as a matter of law, that the underwriter had elected to affirm the contract. I would rather leave the question to the jury, putting it thus: "Here is an act which if unexplained, shews that the defendant is treating the contract as subsisting; but if in the surrounding circumstances you can find reason for saying thatthe assured was not warranted in so regarding it, you may find for the defendant. Primâ facie, however, it is an election, and it is for the defendant to point out some accompanying circumstance, shewing that the assured had no right so to understand it." This is not quite what the learned judge did; he should have left it to the jury, as putting the burden of proof on the defendant to shew that the plaintiff did not understand it, or had no right to understand it, as an election.

For my own part I cannot but think that both Fisk and Pritchett intended to go on, and did not much care for the telegram. I mention this as shewing the reasonableness of requiring notice; for if this was so, it is reasonable to suppose that the broker entertained that notion, and, entertaining it, abstained from acting further; whereas if he had been informed of the defendants' intention to avoid the contract, he might possibly have obtained another policy in substitution. The plaintiff has, by the defendants' silence, been deprived of his opportunity of going elsewhere.

CLEASBY, B. If the only question were, whether there was a sufficient finding that there had been a material concealment by the plaintiff, that is a matter of opinion on which I should not have differed from my learned Brothers. But as there is another question of great importance, as to the effect of giving out the policy after the slip had been executed and the risk taken, on which I cannot concur in their judgment, I am bound to state also my opinion on the first point. It appears to me that the finding of the jury that there was a material concealment by the plaintiff was warranted by the evidence, and that not only was there sufficient evidence to warrant them in coming to that conclusion, but that they came to it upon the fact of the concealment of the memorandum. The learned judge, it seems, attached very little weight to this circumstance; but the counsel for the defendants attached a good deal, and the jury, I think, took up the point as a

material one and acted upon it. [The learned judge here referred to circumstances shewing that the jury acted on this evidence, and proceeded.] Therefore I arrive at the conclusion that the jury found there was a material concealment, and found it upon the suppression of the memorandum. I think, therefore, that the jury have dealt with the whole of the evidence and that we ought not to interfere with their finding.

But the question of greatest importance is that which relates to the effect of the defendants' act in delivering out the policy, after knowledge of the facts, without saying anything to qualify their act. Does this, as a matter of law, operate as a waiver of a matter of defence then in the knowledge of the underwriter? I agree that a man may, by words or by conduct, elect to waive an objection which entitles him to avoid a contract; and if he does so he cannot afterwards set up that objection. But I think that the conduct relied upon here, that is, the defendants' act in giving out the policy without at the time doing anything to indicate that they reserved their right to insist on the objection, ought not to be regarded as anything in the nature of an election. First, however, I will call attention to the real position of the parties at the time when this knowledge was acquired, for I cannot think that the underwriter for a moment had any intention or idea of insuring against the contingency of the *Cambria* being the vessel which was upon the rocks. The whole negotiation shews this to be so. The risk was taken before there was any idea of such a state of things; the premium was founded on the class of the vessel, the nature of her voyage, and the time that had elapsed; and no intention was ever directed to the contingency of the *Cambria* being the vessel on the rocks. As to what happened on passing through the room, I look on it as a mere assurance by Previté that the announcement did not concern the matter at all; he knew of it, and knew that there was nothing in it; and on that footing the transaction goes on, that is, on the old footing. What passed then is conclusive to shew that nothing was ever done to introduce a new risk, a new intention founded on a new idea, namely, that the *Cambria* was the vessel on the rocks. This takes the case out of the region of election altogether.

But supposing this to be otherwise, and supposing also that there

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MORRISON v. UNIVERSAL MARINE INSURANCE COMPANY.

was a discovery of a material concealment, what was the effect of giving out the policy? Now, the contract was not made by the policy; the only real contract was made by initialing the slip. A contract is constituted by the concurrence in intention of two parties, the one promising something to the other, who on his part accepts the promise; it is binding at the time when the two parties separate with that idea in the mind of each; the idea of the one being "I promise," and of the other, "I accept." Thus in the Statute of Frauds (s. 17), which provides that "no contract . . . shall be allowed to be good," unless evidenced in a certain way, what has taken place by word of mouth is spoken of as a contract. The particular evidence or mode of expression required by the statute to make it enforceable at law is a different matter. But to add that expression is a matter of obligation, a thing required not by any arbitrary code, as the use of the term honour would seem to signify, but by conscience and the sense of right prevailing universally, and under the influence of which all the transactions of life take place. The effect of this is, that when, as frequently happens, several acts must be done to complete the transaction, although in fact consecutive they are nevertheless treated as contemporaneous, and the whole is said to take place uno flatu. Thus here, the slip having been initialed, and the premiums paid or promised, the policy, whenever it is given out, is as between the parties to be taken as executed uno flatu with the actual making of the contract. This is the view acted upon in *Cory* v. *Patton* (1); the Court of Queen's Bench there regarded the policy as given out uno flatu with the initialing of the slip; they held the plaintiff entitled to consider the matter as then concluded, and the rights of the parties fixed, and they therefore held the fact that the assured afterwards became aware of material facts which he did not communicate to the underwriter, an immaterial circumstance; in other words, they treated the slip and the policy as the same document. The House of Lords also, in the case of *Xenos* v. *Wickham* (2), dealt with a similar question in a way justifying the conclusion I have arrived at; for they held that the date of formal delivery was immaterial. They obviously considered that the exercise of the mind or the intention to deliver was the material thing, and that the

(1) Law Rep. 7 Q. B. 304. (2) Law Rep. 2 H. L. 296.

policy, though still in the pigeon-holes of the underwriter, was to be treated as if actually delivered. That being so, a contract having been made, and what follows afterwards having reference to the time of the contract, the doctrine of election does not apply. The mind of the underwriter is not then directed to any other idea than that of giving out a formal document. That is an act done as a matter of course; how then can it be an act of election? The evidence in my opinion justifies this view. Therefore in my opinion, the learned judge was right in not telling the jury that giving out the policy was of itself an election (under the new state of circumstances that had arisen) not to avoid the contract, but to keep it on foot; and in leaving the question generally to the jury, whether the defendants had adopted the contract by not taking the objection within a reasonable time; and I also think their verdict right.

There is another matter of importance. In dealing with the question of election, we ought to take into consideration the position of the person doing it as regards knowledge of all the facts. Now on this point there was upon the evidence matter which, if gone into fully might materially influence the consideration of whether the underwriter did or did not elect. They might have acted under the impression that nothing was known to the plaintiff; and their knowledge of the memorandum not communicated by him (apart from the question of whether that non-disclosure avoided the contract), might have materially influenced any election they might have been disposed to make.

In my opinion this rule should be discharged.

Rule absolute.

Attorneys for plaintiff: *Sharpe, Parker, & Co.*
Attorneys for defendants: *Thomas & Hollams.*

Re M—— T——.

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Nov. 22.

Attorney—Suspending Attorney from Practice.

An attorney and solicitor having been suspended by the Master of the Rolls from practising in the Court of Chancery for ten years, this Court, on affidavits verifying (1) copies of the petition and order in Chancery and the affidavits filed there on the hearing of the petition, and (2) a transcript of a shorthand-writer's notes of the judgment, made a similar order, *unless* cause were shewn before the fourth day of next term.

Garth, Q.C., on behalf of the Incorporated Law Society, applied to the Court to make an order suspending from practice for ten years an attorney of the Court, whom the Master of the Rolls had suspended from practising for that time as a solicitor in the Court of Chancery. He mentioned that the Court of Queen's Bench, following the rule laid down in 23 & 24 Vict. c. 127, s. 25 (1), for the case where an attorney is struck off the rolls, had, without further inquiry into the merits, made the same order as the Master of the Rolls, but that the Court of Common Pleas had adhered to their practice of inquiring into the matter themselves, and exercising an independent judgment, as in the case of *In re Brutton*. (2) On a similar application in *Brutton's Case*, the Court of Queen's Bench had acted on the same rule as at present, but this Court had adhered to its old practice of granting a rule nisi.

The Court (3) ultimately made the following order: "It is ordered that, unless cause be shewn on or before the fourth day of Hilary Term, 1873, the said M—— T—— be suspended from practising as an attorney of this Court for ten years, with leave, nevertheless, to apply again to this Court in the meantime, upon

(1) By 23 & 24 Vict. c. 127, s. 25, "The name of every person hereafter struck off the roll of attorneys of any of the superior courts of common law at Westminster by the rule of any of such courts, or off the roll of solicitors of the Court of Chancery by order of any judge of that court, shall, upon production of an office copy of such rule and order, and an affidavit of the identity of the person named therein, to the proper officer of every or any other of the said courts of which such person is attorney or solicitor, be struck off the roll of such court," and a similar provision is made for the case of an attorney or solicitor being restored to the roll.

(2) 20 W. R. 298.

(3) Kelly, C.B., Martin, Bramwell, and Channell, BB.

(a) See Re Turner 7 Q.B.D. 103.

notice of this rule to be given to the said M—— T——"; and directed that the order should be drawn up on reading (1) an affidavit verifying copies of the petition of the Incorporated Law Society to the Master of the Rolls, of the affidavits filed upon the hearing of the petition, and of the order made by the Master of the Rolls, and (2) an affidavit of a shorthand-writer verifying the transcript of his shorthand note of his Honour's judgment. (1)

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RE M—— T——.

Attorney for the Incorporated Law Society: *Williamson.*

THE PLUMSTEAD BOARD OF WORKS *v.* INGOLDBY AND OTHERS.

Nov. 11.

Metropolis Local Management Acts, 1856 & 1862 (18 & 19 *Vict. c.* 120, *s.* 105; 25 & 26 *Vict. c.* 102, *s.* 77)—*Apportionment Payable by Future Owners—Charge on Land.*

The assessments for paving expenses apportioned by the vestry or district board under s. 77 of the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), are a charge upon the premises in respect of which they are assessed; and the amount may be recovered from the future owners of such premises, although there has been no arrangement to accept payment by instalments.

Affirmed in Ex. Ch. 10 B. & S. 174

SPECIAL CASE stated in an action brought to recover from the defendants, as owners of certain property, the sum of 57*l.* 10*s.*, the amount of a contribution assessed on that property by the plaintiffs under the following circumstances.

On the 25th of March, 1868, the plaintiffs, acting under the Metropolis Local Management Acts, 1856 and 1862 (18 & 19 Vict. c. 120 and 25 & 26 Vict. c. 102), resolved that a new street within their district, called Granville Mews North, should be paved, in accordance with their surveyor's plan and estimate, and that the owners of the houses forming the street, and of the land bounding and abutting on it should pay to the board 170*l.* 13*s.* 4*d.*, the amount of the estimated expenses; and they apportioned the amount between the owners, according to a schedule appended to their resolution. At the same time they passed a similar resolution with respect to Middle Granville Mews, and apportioned the expenses among the owners of the houses and land in and abutting on that street.

(1) Jan. 23. *Garth*, Q.C., moved to make the rule absolute, but the Court said that, no cause having been shewn, the rule was already absolute.

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At the date of these resolutions three properties, forming part of the houses and lands in and abutting on the streets, were owned by W. C. Banks. The total amount of the contributions assessed on the three properties was 57*l.* 10*s.*, no part of which was paid by Banks or by any other person.

On the 3rd of December, 1868, Banks mortgaged these properties to the defendants, as trustees of the Planet Building Society; and, default being made, the trustees, on the 25th of December, 1869, took possession. They had no notice of the apportionment till the 15th of November, 1870.

Payment of the apportioned sum being demanded and refused, this action was brought.

The question for the Court was, whether the action was maintainable. (1)

(1) The material sections of the two Acts are as follows:

18 & 19 Vict. c. 120, s. 105. "In case the owners of the houses forming the greater part of any new street . . . . which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved," the vestry or board is to pave and keep the same in repair; "and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor, for the time being, of the vestry or board)," and if the estimated exceed the actual expenses, the difference is to be repaid to the owners of houses, by whom the said sum of money has been paid; "and in case the estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money, as together with the sum already paid, amounts to such actual expenses."

Sect. 250. "The word 'owner' shall," except for certain purposes, not including those of s. 105, "mean the person, for the time being, receiving the rack rent of the lands or premises, in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

25 & 26 Vict. c. 102, s. 77. "Where any vestry or district board shall," under 18 & 19 Vict. c. 120, s. 105. "have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, in-

Barrow, for the plaintiffs. The question is simply, whether a contribution assessed upon a property under 25 & 26 Vict. c. 102, s. 77, can be recovered against a subsequent owner. Under the earlier Act (18 & 19 Vict. c. 120), this might, perhaps, have been doubtful. By that Act (s. 105), an estimate was to be made before the work was commenced, and if the estimated expenses fell short of the actual expenses, the deficiency was to be made good by the owners; but it does not appear that the amount could be recovered from any persons who were not owners, either at the date of the original estimate and apportionment, or of the apportionment on a deficiency. But the express words of s. 77 of 25 & 26 Vict. c. 102, remove all difficulty; by that section the board may apportion and may recover the costs and charges, "either before the work shall be commenced, or during its progress, or after its completion." This makes the liability altogether independent of the question of ownership at the time when the estimate was framed. But, further, the same section expressly provides that the "amount apportioned or charged in respect of each house

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cluding the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable, either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a Justice of of the Peace at the option of the vestry or board."

By s. 53, in certain cases the cost of constructing sewers is to be in part defrayed by the owners of houses and land in or adjoining the street where the sewer is made, and "the amount, so charged by the vestry or district board, upon or in respect of each house or premises shall be payable, either before the works shall be commenced, during their progress, or after their completion, as the vestry or board shall in each case determine, either in one sum or by instalments within such period, not exceeding twenty years, as the vestry or board shall direct; and any such sum or instalment shall be recoverable from the present or any future owner of such house or premises, either by action at law or in a summary manner before a Justice of the Peace, at the option of the vestry or board."

By s. 96 the costs or expenses which "the owner of any premises may be liable to pay" may be recovered from the occupier, who is entitled to deduct them from his rent, subject to any contract between him and the owner.

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or premises" may be recovered from "the present or any future owner of the premises." The effect of this is to make the assessment a charge on the land. It may be suggested that the provision as to recovering payments from future owners, refers only to the case of the "amount apportioned" being made payable by instalments, and that the "amount" which may be thus recovered is only the amount of each separate instalment. But this would give the word "amount" a different sense in the two parts of the section. The meaning which the plaintiffs give to the word is consistent with itself, and is also consistent with the definition of "owner" in s. 250 of 18 & 19 Vict. c. 120, that is, the person, "for the time being" receiving, or entitled to receive, the rent of the premises. The 53rd section makes a similar provision for the cost of sewers, but in place of the word "amount" it uses the words "sum or instalment;" here, if the legislature had meant to limit the provision to instalments, they would have used the word instalment; as it stands, the single word of s. 77 is equivalent to the two words of s. 53, and the same effect is produced by the two sections. This is the construction given to the section in the judgment of the Court of Common Pleas in *Vestry of Bermondsey* v. *Ramsey* (1). That case may be treated as an authority for the plaintiffs' construction; for the occupier, who was there sued under sect. 96 after judgment recovered against a former owner, would have had a complete defence to the action, if the owner, under whom he held, had not been liable.

Wilberforce (*Prest* with him), for the defendants. Under the earlier Act the board could only apportion the amount of the original estimate at the time when it was made, and could only recover the apportioned sums from those who were owners at the time of the apportionment. The effect of the later Act was to allow of an apportionment at either of three periods, before the commencement of the work, during its progress, or after its completion. But the persons on whom the apportionment was made are still the persons from whom it is to be recovered. Whatever time the board choose for apportionment, that is the time when the charge is imposed, the owners at that time become liable, and there is nothing to shift the liability to any subsequent owner. The con-

(1) Law Rep. 6 C. P. 247, at p. 250.

struction of s. 77 shews that this is the true meaning; the first clause provides for assessment upon lands as well as houses; the second clause provides for apportionment and for recovery of the sums apportioned; the third clause provides for payment by instalments, and is limited to the purpose of enabling the board to accept payment by instalments; as a necessary consequence, it makes these instalments a charge upon the land, and recoverable from the "present or any future owner;" but this would have been a quite unnecessary provision if the section had already empowered the board to recover an apportioned sum from any subsequent owner. The difference of language in s. 53 and s. 77 shews that the intention of the legislature was different.

Barrow was not heard in reply.

KELLY, C.B. I am of opinion that the plaintiffs are entitled to judgment. By force of the present statute the vestry or board may recover either from the owner at the time the apportionment is made, or from any subsequent owner. By the former Act (18 & 19 Vict. c. 120, s. 105) they had only power to recover from subsequent owners in the event of the actual exceeding the estimated expenses, and a fresh apportionment being made. Hence, as it was practically impossible to estimate exactly the expense of works which were to be executed, and as the estimated might exceed the actual expenses, but yet must be apportioned at once, it became necessary to provide for the return of any excess or balance which might remain in the hands of the vestry or board after the works were completed. The persons, however, to whom the money was to be returned might be no longer the owners of the houses in respect of which the contributions were paid. The inconveniences and defects of this arrangement were remedied by the provisions of the present statute (25 & 26 Vict. c. 102, s. 77), which, though somewhat obscure in its language, gives, when the whole is looked at, a tolerably clear meaning. After providing that lands as well as houses may be assessed (a provision which does not touch the present question), the section goes on to enact that "any such costs and expenses . . . shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or

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after its completion." That is, the contribution may be apportioned and may be recovered either at the time when the original estimate is made, or at any time afterwards. The section then provides that the vestry or board may accept payment of the "amount apportioned" by instalments. This is the first time that the word "amount" is mentioned, and it clearly means the whole of the amount apportioned. The same word is used with reference to the mode of recovering payment, and it equally applies to the entire amount, whether payable at once or by instalments; in either case the "amount apportioned" may be recovered "from the present or any future owner." The words are sufficient to apply to either case, and there is nothing unreasonable in so applying them. The premises have been benefited by the expenditure of the public body, and it would be very unreasonable that the sum so expended should not be repaid by those whose property has been thus improved.

BRAMWELL, B. I am of the same opinion.

CHANNELL, B. I am of the same opinion. It is not contended that the apportionment was not rightly made; the only question is, whether the defendants are, under the circumstances, liable to pay the amount assessed on their property. I think the effect of the Act is to impose a liability on the land; and this is shewn by s. 96, which gives power to the vestry or board to recover payment from the occupier, and empowers the occupier to deduct the money paid by him from the rent.

PIGOTT, B. I am of the same opinion. Whatever difficulty there might have been under the earlier Act, s. 77 of the later Act clearly enables the board to recover to the fullest extent from the present or future owners of the land.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Jay & Dale.*
Attorneys for defendants: *Ingle, Cooper, & Holmes.*

RICHARDSON *v.* WILLIS.

1872
Nov. 22.
1873
Jan. 20.

Evidence of Judgment—14 & 15 *Vict. c.* 99, *s.* 13.

The 13th section of 14 & 15 Vict. c. 99, which allows a criminal record to be proved by a certificate of the officer having custody of the record, omitting the formal parts, applies to proof in civil as well as in criminal proceedings.

Where a person indicted for libel is acquitted, and becomes entitled to his costs under 6 & 7 Vict. c. 96, s. 8, he may recover them from the prosecutor by action.

1 QBD. 45
2 QBD. 40

THIS was an action brought under 6 & 7 Vict. c. 96, s. 8 (1), to recover the sum of 25*l.*, the plaintiff's taxed costs of defending an indictment for libel, which was preferred against him by the defendant, as a private prosecutor, at the Essex Assizes, the declaration alleging that "the said petty jury acquitted him of the premises in the said indictment so charged upon him as aforesaid, and found him not guilty upon the same, whereupon judgment was given for the said plaintiff, and he was duly discharged of and from the premises in the said indictment specified."

The defendant pleaded, amongst other pleas, *nul tiel record.*

The plaintiff replied to this plea, that "there is a record of the said judgment remaining in the said court of assizes of oyer and terminer and general gaol delivery as the plaintiff hath above alleged, and the plaintiff prays that the said record may be inspected by the Court here, and hereupon the plaintiff is commanded that he have the same here on Friday, the 22nd day of November, A.D. 1872, and the same day is given to the defendant in the same place," and the plaintiff joined issue on the remaining pleas.

The roll having been made up and carried in, the plaintiff gave notice to the defendant that he would, on the day mentioned in the

(1) 6 & 7 Vict. c. 96, s. 8, enacts that "in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information . . .; such costs so to be recovered . . to be taxed by the proper officer of the Court before which the said indictment or information is tried."

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replication, produce to this Court the said record: see Chitty's Practice, vol. ii. p. 936.

Nov. 22, 1872. *Philbrick*, for the plaintiff, moved the Court for judgment on the issue of *nul tiel record*, and produced a certificate under the hand of the deputy-clerk of assize for the Home Circuit, under 14 & 15 Vict. c. 99, s. 13. (1)

Willis, for the defendant, objected that it appeared by the recital that the section was only intended to diminish the expenses of criminal proceedings, and that it was not applicable to the proceedings in a civil action.

THE COURT (2) said that the language of the statute was general, and applied to all proceedings, and gave

Judgment for the plaintiff.

Jan. 20, 1873. After the cause had been tried, and a verdict found for the plaintiff, a demurrer to the declaration came on for argument.

Willis, in support of the demurrer, contended that the plaintiff could not recover by action, but should have issued execution on the taxation in the ordinary way; he referred to *Reg.* v. *Latimer*. (3)

[MARTIN, B., observed that *Reg.* v. *Latimer* (3) was a criminal information; the record was therefore a record of the Court of Queen's Bench.]

Philbrick, for the plaintiff, said that was so; and that if the taxation of costs had been at the assizes upon the trial of a

(1) By 14 & 15 Vict. c. 99, s. 13, after reciting that "it is expedient as far as possible to reduce the expense attendant upon the proof of criminal proceedings," it is enacted that "whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the Court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

(2) Kelly, C.B., Martin, Bramwell, and Channell, BB.

(3) 15 Q. B. 1077; 20 L. J. (Q.B.) 129.

criminal record, the Court would have had no jurisdiction to review the taxation: *Reg.* v. *Newhouse.* (1)]

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RICHARDSON v. WILLIS.

THE COURT (2) said there was no power in a Judge of oyer and terminer to issue execution, and that the case fell under the general rule that where a statute gave a right to a sum of money and provided no means of recovering it, the remedy was by action.

Judgment for the plaintiff.

Attorney for plaintiff: *Oldman.*
Attorneys for defendant: *Evans, Laing, & Eagles.*

WELSH *v.* MERCER.

Nov. 22.

Practice—Inferior Court—Motion for New Trial in Court of Passage.

In cases tried before an inferior Court a motion for a new trial, or on leave reserved, cannot be made in this Court unless either counsel moving was present at the trial, or the judge's notes are produced with an affidavit verifying his signature; and in any case the judge's notes, so verified, must be produced on the argument of the rule.

The notes, if erroneous or defective, cannot be corrected by affidavit.

THE plaintiff in this action having obtained a verdict for 35*l.* in the Court of Passage, at Liverpool, *R. G. Williams,* on behalf of the defendant, had, in pursuance of leave reserved, obtained a rule nisi in this Court to enter a nonsuit (16 & 17 Vict. c. xxi. s. 45).

Segar, for the plaintiff, appeared to shew cause; but the objection was taken by the Court that the assessor's signature to his notes of the trial was not verified by affidavit.

R. G. Williams, in support of the rule, referred to *Morrison* v. *Wookey.* (3)

[THE COURT. The rule is that, when the trial takes place in an inferior court, a motion cannot be made here unless the counsel moving was present at the trial and can state the facts on his own

(1) 22 L. J. (Q.B.) 127.
(2) Kelly, C.B., Martin, Cleasby, and Pollock, B.B.
(3) 15 C. B. (N.S.) 457.

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WELSH v. MERCER.

recollection, or unless the judge's notes are produced, verified by affidavit; and in any case on the argument of the rule the notes must be produced so verified. This Court cannot take judicial notice of the judge's signature.]

R. G. Williams having undertaken to lodge an affidavit verifying the assessor's signature, the argument proceeded.

Segar objected that the notes were defective, and proposed to read, upon affidavit, portions of the evidence which the assessor had not taken down.

[THE COURT. We cannot correct the assessor's notes by affidavit; the rule had better be enlarged till next Term, and the assessor be requested to revise his notes.]

Next Term the rule came on for hearing again, and the assessor adhering to his note, the rule was discharged.

Attorney for plaintiff: *Blackhurst, Liverpool.*

Attorneys for defendant: *Norris, Allen, & Carter.*

END OF MICHAELMAS TERM, 1872.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXVI VICTORIA.

SANDERSON *v.* ASTON.

1873
Jan. 20.

Surety—Discharge of Surety by Alteration of the Guaranteed Contract—Material Alteration.

Declaration on a bond given to the plaintiff by the defendant, which recited that by an agreement of even date the plaintiff had agreed to admit J. into his service as "clerk and traveller" (not further stating the terms of the agreement), and was conditioned for J.'s accounting for and paying over to the plaintiff all moneys which he might receive on plaintiff's account; the breach alleged being that J. had received moneys for the plaintiff which he had not accounted for or paid over.

Pleas, on equitable grounds. 2. That the original agreement between the plaintiff and J. was that it should be terminable by one month's notice; and that the plaintiff and J. afterwards, and before the defaults sued for, made it terminable by three months' notice, without the defendant's consent.

3. That before the defaults sued for, J. had committed other defaults of the same kind; that the plaintiff had, with knowledge of those defaults, continued to employ J. in his service without notice to the defendant; and that the defaults sued for were committed during such continuance of the service. On demurrer to these pleas:—

Held, first (Martin, B., doubting), that the second plea was bad, on the ground

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that it did not shew that the term as to the period of notice was made part of the defendant's contract, and that the alteration alleged did not in fact materially add to the defendant's risk.

Secondly, that the third plea was good, on the authority of *Phillips* v. *Foxall* (Law Rep. 7 Q. B. 666).

DECLARATION on a bond given by the defendant to the plaintiff, the condition of which recited that, by an agreement of even date, the plaintiff had agreed to admit into his service, as clerk and traveller, one John Thomas Johnson, upon Johnson's obtaining two sureties "for his duly and faithfully accounting to the plaintiff, his executors, &c., and other the person or persons who should or might become partner or partners with the plaintiff in his business of a lead, glass, and colour merchant, in manner thereinafter mentioned, and for his faithful and honest conduct during the time of his continuance in the said service;" the condition of defeasance being that Johnson should from time to time, and at all times, well and satisfactorily account for, and pay over and deliver to the plaintiff all and every sum and sums of money, &c., which he should receive for the use of the plaintiff or the plaintiff and any person who might become his partner; and the breach alleged being, that Johnson did not well and satisfactorily account for, or pay over, or deliver to the plaintiff, or to the plaintiff and his partner, certain sums of money (amounting to 84*l.* 9*s.*) received by him for the use of the plaintiff and his partner during his service with them.

Pleas: 2. On equitable grounds, that it was one of the terms of the agreement in the said condition mentioned, that the agreement should be terminated by one month's notice on either side; and that, afterwards, the plaintiff and Johnson, without the knowledge, privity, or consent of the defendant, altered the agreement and made it terminable by three months' notice on either side, and thereby materially increased the risk of the defendant as surety, and that the defaults alleged were committed by Johnson after the alteration.

3. On equitable grounds, that Johnson, before the commission of the said defaults, had committed during the said service divers other defaults of the same kind; and that the plaintiff, though well knowing the said last-mentioned defaults, wholly omitted and

neglected to inform the defendant thereof, and, notwithstanding the said last-mentioned defaults, continued to employ and retained Johnson in the said service; and that the defaults alleged were committed by Johnson during the said continuance and retention of him by the plaintiff in the said service.

Demurrers and joinder.

R. G. Williams, for the plaintiff. The second plea is bad. It does not shew that the terms of the agreement between Johnson and the plaintiff were made part of the defendant's contract; the defendant guarantees Johnson generally in his employment of clerk and traveller to the plaintiff. If he had made the particular terms of that service part of his contract, the plaintiff would, no doubt, have been unable to alter any of those terms without discharging him: *North Western Ry. Co.* v. *Whinray* (1); *Frank* v. *Edwards* (2); but where this is not done, the surety can only claim to be released when his position has been materially altered by the change, either by increasing his liability, or by diminishing his security: *Bonar* v. *Macdonald* (3). The change here made in the duration of the notice cannot really affect the defendant's risk; it is of far less consequence than the change in the period of accounting, which was held not to discharge the surety in *Stewart* v. *M'Kean.* (4) The third plea is also bad; it is pleaded on the authority of *Phillips* v. *Foxall.* (5) That case, however, as well as the observations of Malins, V.C., in *Burgess* v. *Eve* (6), on which the decision was chiefly founded, proceeded on the ground that the defaults which the employer had condoned without the knowledge of the surety involved dishonesty, which would have entitled the employer to dismiss. But there may be many defaults which would not entitle the employer to dismiss, and it is not averred, neither is it to be assumed, that the defaults alleged in the plea were not such.

Lewers, for the defendant, was directed to confine himself to the second plea. The second plea is good. If the agreement between the plaintiff and Johnson was altered in any respect, it became a new and different agreement, and the surety is dis-

(1) 10 Ex. 77; 23 L. J. (Ex.) 261.
(2) 8 Ex. 214; 22 L. J. (Ex.) 42.
(3) 3 H. L. C. 226.
(4) 10 Ex. 675; 24 L. J. (Ex.) 145.
(5) Law Rep. 7 Q. B. 666.
(6) Law Rep. 13 Eq. 450.

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charged; or, rather, it becomes an agreement which the surety had never guaranteed: *Tayleur* v. *Wildin*. (1) But, further, the alteration was a material one; it took away from the surety the security which would be afforded to the employer (and therefore to himself) by the power of dismissing a clerk on a short notice.

R. G. Williams, in reply.

KELLY, C.B. I am of opinion that there is nothing in the matters alleged in the second plea to discharge the surety. The authorities cited go to shew that we are to look at the terms of the surety's engagement; not at the terms of any agreement between the employer and employed, unless these terms are made part of the surety's agreement, or unless something has been done, which, with reference to those terms substantially alters his position. Now the plea alleges that it was a term of the contract between the employer and employed, that the service should be terminable by one month's notice, and that afterwards, and before the defaults in respect of which the action is brought, they varied the contract by providing that the service should only be terminable by a three months' notice on either side. And if it clearly appeared that the surety had entered into the agreement on the faith of the original contract, that is, if notice had been given to him of the terms of the contract, and he had, after that notice, entered into this bond, he would undoubtedly have been discharged by the alteration. The case of *North Western Ry. Co.* v. *Whinray* (2), shews that if the agreement between the employer and employed had been made the basis of the surety's contract, and if for that original agreement another had been substituted determinable on a different event, that which was the basis of the surety's contract would be gone, and the surety would be discharged. But it does not appear that the surety ever had notice of that agreement, further than that the plaintiff had agreed to employ Johnson as traveller upon his obtaining two sureties for his "duly and faithfully accounting," and for his "faithful and honest conduct."

But the third plea raises a different question. The case of *Phillips* v. *Foxall* (3) clearly shews that, if any defaults or breaches

(1) Law Rep. 3 Ex. 303. (2) 10 Ex. 77; 23 L. J. (Ex.) 261.
(3) Law Rep. 7 Q. B. 666.

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of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him. The question therefore is, whether the allegation of the plea shews such breaches of duty as would have entitled the plaintiff to dismiss Johnson, and would, therefore, have entitled the surety to call upon him to do so. It is said that no dishonesty is shewn by the plea. That may well be; and yet the employed by failing to pay over money which he has received may commit a breach of his duty, which would entitle his employer to dismiss him. Now we must take it on the plea, reading it with the declaration, that Johnson had received for the plaintiff certain sums of money which it was his duty to pay over, and which he did not pay over, and the question is, whether that is not primâ facie a breach of duty which would entitle the plaintiff to dismiss him. I am of opinion that it is, and that it is sufficient if the plea raises such a primâ facie case.

MARTIN, B. I think the third plea is good on the authority of *Phillips* v. *Foxall*. (1)

It is my impression that the second plea is good also; for I think the declaration must be taken as meaning that the defendant was to guarantee Johnson's fidelity in that service which he entered on with the plaintiff; and I apprehend that, if afterwards the plaintiff and Johnson entered into a new contract which would cast a new liability upon the surety, the surety was discharged. Now, if by the original contract Johnson was liable to be dismissed at one month's notice, and that is afterwards altered into a contract for a three months' notice, that is a material alteration, involving a new liability in the surety, and which, therefore, if entered into without his consent, will discharge him. I do not, however, entertain this opinion so strongly as to induce me to dissent from the judgment of the Court.

PIGOTT, B. I think the second plea is no defence. It is pleaded on equitable grounds, and the fact relied on is, that the agreement between Johnson and the plaintiff was made determi-

(1) Law Rep. 7 Q. B. 666.

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nable by a three months' notice instead of a one month's notice, without the knowledge or consent of the surety, whereby the risk of the surety was materially increased. I think the averment that the risk was materially increased is a proposition of law, an inference from the previous statement; we have to see whether that is a proper inference, so as to give the surety a defence in equity, and I am of opinion that it is not. If the creditor agrees to change the terms of his contract with the person on whose behalf the guarantee is given, and does thereby increase the surety's risk without his consent, the surety is discharged. Equally, if the surety chooses to contract on the terms of the original agreement, so as to make that agreement a material part of his contract, he is discharged by the alteration. But if (which appears to be the case here) the change of terms takes place in an agreement which is merely collateral to that of the surety, and is not made a part of it, and if it is also quite immaterial to the risk, it affords the surety no answer. Now, I think this change did not affect the surety's risk at all. If a notice were given for three months as required by the new agreement, his risk would not extend over the whole three months, but would terminate at the end of the first month. He is therefore no worse off because of the change, and his plea therefore fails.

As to the third plea, I agree that it is good for the reasons already given.

POLLOCK, B. I also agree that the third plea is quite within *Phillips* v. *Foxall.* (1)

As to the second plea, after what has been said by my Brother Martin, I express my opinion with some diffidence, but I think it is bad. Pleas of this kind are well known at law, and *Whitcher* v. *Hall* (2) is a leading case upon the subject. In that case there was an agreement between the plaintiff and Joseph Hall for the letting of the milking of thirty cows, and that agreement was imported into the contract by which James Hall, the defendant, guaranteed to the plaintiff the payment by Joseph Hall of the rent. A change being afterwards made in the number of the cows, the surety was held to be discharged, and Bayley, J.,

(1) Law Rep. 7 Q. B. 666. (2) 5 B. & C. 269.

says (3): "The new agreement was binding only on the persons who were parties to it. If it had been intended to bind James by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may perhaps be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is whether the contract performed by the plaintiff is the original contract to which the defendant was a party." That case (which was no doubt a very strong decision) has been acted on ever since, when the party who has become surety has taken care that the original agreement should be made part of his contract. But in the cases cited to us, where the original contract was not made part of the surety's contract, but the Court has nevertheless said that the surety was discharged, there has been some material alteration in the terms of the original agreement, in this sense, that the surety has been injured or put in a worse position by the change. It is therefore open to the Court in such cases to consider whether the alteration is a material one or not, and I am of opinion that the alteration in the present case is not so. The distinction I have adverted to was no doubt in the mind of the pleader when he pleaded this plea on equitable grounds.

Judgment for the plaintiff on the demurrer to the 2nd plea; for the defendant on the demurrer to the 3rd plea.

Attorneys for plaintiff: *Cunliffe & Beaumont.*
Attorneys for defendant: *Lambert, Burgin, & Petter.*

(1) 5 B. & C. at p. 275.

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Jan. 16.

LARCHIN *v.* THE NORTH WESTERN DEPOSIT BANK.

Bill of Sale—Sufficiency of Description of Grantor—"Accountant."

The grantor of a bill of sale described his occupation as that of an "accountant." He was in fact a clerk in the accountants' department at the Euston Square Station of the London and North Western Railway Company:—

Held, an insufficient description.

INTERPLEADER issue between the plaintiff, being the claimant under a bill of sale granted by one Samuel Whitehead, and the defendants, being the execution creditors of Whitehead.

At the trial before Bramwell, B., at the Surrey Assizes, 1872, it was proved that Whitehead was a clerk in the accountants' department at the Euston Square Station of the London and North Western Railway Company, and that in his leisure time, after office hours, he sometimes was employed by tradesmen at Acton, where he resided, to balance their books. In the bill of sale he was described "Accountant, Kingsdown Villa, Avenue Road, Acton."

It was contended by the defendants that this description was insufficient under the Bills of Sale Act, 1855 (17 & 18 Vict. c. 36), s. 1, which requires a description of the residence and "occupation" of the grantor to be filed in the Court of Queen's Bench, within twenty-one days after the making of a bill of sale, and, the learned judge being of that opinion, a verdict was entered for the defendants, with leave to move to enter a verdict for the plaintiff if the Court should think the description sufficient. A rule was obtained accordingly, against which

Willis shewed cause.

Day, Q.C., and *Salter*, supported the rule, citing *Briggs* v. *Boss* (1), and *Grant* v. *Shaw*. (2)

THE COURT (Kelly, C.B., Martin, Bramwell, and Pigott, BB.), held the description "accountant" insufficient. The real occupation of the grantor was that of clerk in a department of the London and North Western Railway Company.

Rule discharged.

Attorney for plaintiff: *W. Norris.*

Attorneys for defendants: *Howard & Co.*

(1) Law Rep. 3 Q. B. 268. (2) Law Rep. 7 Q. B. 700.

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Jan. 22.

Joint and Several Bond—Release of one of the Joint and Several Debtors—Principal and Surety.

To an action on a bond the defendant pleaded that it was the joint and several bond of himself and J., and was executed by him as surety only for J.; that afterwards a composition deed was made between J. of one part, and the plaintiff and another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for the benefit of his creditors "in like manner" as if J. had been adjudged bankrupt; and each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bankruptcy;" and that the plaintiff executed this deed without the consent of the defendant. On demurrer:—

Held (by Kelly, C.B., and Bramwell, B., Pigott, B., dissenting), a good plea.

10 L.J. 12, 10 C.L.J. 212

DECLARATION that the defendant by his bond dated the 18th of September, 1863, became bound to the plaintiff in the sum of 200*l.* subject to a condition that if one Thomas Jones and the defendant or either of them should pay the plaintiff 100*l.* with 5 per cent. interest on the 18th of March then next ensuing, the bond should be void, but otherwise to remain in force; yet Thomas Jones and the defendant did not, nor did either of them, pay the said 100*l.*, and the same is still due and unpaid.

Plea: That the bond declared on was a joint and several bond of the defendant and Thomas Jones, and was executed by the defendant as surety only, whereof the plaintiff had notice, and afterwards and before action a deed was entered into between Thomas Jones of the one part and one Ackerman and the plaintiff of the other part, on behalf and with the assent of the creditors of Thomas Jones, whereby T. Jones conveyed all his estate and effects to Ackerman and the plaintiff to be administered for the benefit of the creditors of T. Jones, "in like manner as if the said Thomas Jones had been at the date hereof duly adjudged bankrupt, and in consideration of the premises each of the creditors of the said Thomas Jones doth by these presents release the said Thomas Jones from his and their respective debts in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy;" and that the plaintiff duly executed this deed without the consent and request of the defendant so to do.

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Demurrer and joinder in demurrer.

Nov. 18. *Murphy*, in support of the demurrer, contended that the deed relied on in the plea was not an absolute release, but only a covenant not to sue. The principal debtor was only placed in the same position as if he had obtained a discharge in bankruptcy. Creditors' rights against sureties were therefore reserved: *Bateson* v. *Gosling* (1); *Lewis* v. *Jones*. (2)

Bosanquet, contrâ. The deed relied on in the plea was not executed under any Bankruptcy Act, and the plaintiff was bound by it not because of any provision of the bankruptcy laws, but because he himself executed it. It is his deed tying his hands against the principal debtor. Thus he has discharged the surety; or, setting aside the allegation that the defendant was surety for Thomas Jones, the plaintiff has precluded himself from proceeding against one of two joint and several debtors. He has, therefore, released the other.

Murphy, in reply.

Cur. adv. vult.

Jan. 22. The following judgments were delivered:—

KELLY, C.B. I am of opinion that the defendant is entitled to the judgment of the Court. This is a case of creditor, debtor, and surety. One Jones was indebted to the plaintiff in the sum of 100*l.*, and the defendant was his surety. The plaintiff now sues the defendant for the debt, and he pleads that the plaintiff has released the debtor without his consent, and he is therefore discharged. Now the law upon this subject is clear and well settled. If the creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged. But the plaintiff contends that in this case he has reserved to himself the right to recover against the surety by the deed in which the debtor is released. The plea of the defendant sets forth the deed in hæc verba; by which it appears that Jones, the debtor, having assigned all his estate and effects to the plaintiff and another as trustees for the benefit of his creditors, the plaintiff and the other

(1) Law Rep. 7 C. P. 9. (2) 4 B. & C. 506, at p. 515 (n).

creditors, in consideration of the premises, did release the said Thomas Jones from his (and their) respective debts, "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." Now the question is this, what is the effect of a release in these terms upon the rights and the condition of these three parties? It appears to me that the meaning of these words is clear and unambiguous. If Jones, the debtor, had obtained a discharge in bankruptcy he would have been discharged not only as against the plaintiff, the creditor, but also as against the defendant, the surety. It seems to me, therefore, free from doubt that the plaintiff by this release, having discharged his debtor as against the surety as well as himself, and without the consent of the surety, the surety is himself discharged.

It is contended that this is a qualified or conditional release; but I look in vain throughout the deed for any words of qualification, or reservation, or imposing or creating a condition. It is true that if a debtor has obtained his discharge in bankruptcy the creditor may still recover against the surety, and he or the surety, if he pay the debt, may prove against the debtor's estate under the bankruptcy. If, therefore, the debtor had really become bankrupt and obtained his discharge, although the creditor might have recovered against the surety, notwithstanding the discharge of the debtor, his right or power to do so would have been the act or consequence of the law or the statutes of bankruptcy, whereas here the discharge of the surety is his own act; and he cannot by his own act reserve to himself the right to sue the surety, notwithstanding the discharge of the debtor, except by the agreement of the debtor that, notwithstanding his discharge, in case the creditor shall recover against the surety, he will remain liable to the surety for the debt. The whole case upon this deed simply stated is that the plaintiff has released his debtor in like manner as if he had obtained a discharge in bankruptcy, and inasmuch as, if he had obtained a discharge in bankruptcy, he would have been absolutely released, and neither the plaintiff nor the defendant could have afterwards sued him for the debt, he is absolutely released now, and as such absolute release was without the consent of the surety, the surety is by law discharged. It is argued that a creditor may release his debtor and reserve to himself the right to sue the

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surety, and that no doubt may be done, but only where the language of the release, or of the deed in which it is contained, is such that the debtor accepts the release subject to the conditions that he shall remain liable to pay the debt to the surety in case he shall have paid it, whether voluntarily or under process, to the creditor. Such was the case in *Bateson* v. *Gosling* (1), where the release was contained in a trust deed under the Bankruptcy Act of 1861, but which was followed by a proviso that if the creditors, including the plaintiff, had any security for their demands, "or any demands against the debtor to the payment whereof any person or persons is or are liable as a surety or sureties; the debtor may execute these presents without prejudice to the same security, or to the claim against any surety or sureties." And this proviso was held to convert the release into a mere covenant not to sue, and to preserve the right of the creditor to sue the surety, and of the surety to sue the debtor; and Willes, J., in his judgment expressly states: "When the release in the deed is looked at it is in terms a release subject to a proviso, and although but for such proviso it would be an absolute release, so that there could be no proceeding afterwards against a surety, yet the proviso expressly reserves the creditors' remedy against a surety, and stipulates that any creditor may execute the deed without prejudice to his claim against any surety." (And again) "But if the principal debtor consented to the creditor having recourse to the surety the latter would not be discharged, and would have his remedy against the principal debtor." So that the release in that case was no discharge of the debtor as against the surety by reason of the proviso. Here there is no such proviso, nor is a single word to be found throughout the deed pointing to any qualification or any reservation whatsoever. The release is in its terms a simple and absolute release by the creditor of his debtor in like manner as if the debtor had obtained a discharge in bankruptcy. If the debtor had obtained a discharge in bankruptcy the surety would have had no right of suit against him, and as the plaintiff, the creditor, has put his debtor in a condition in which the surety has lost his right to proceed against him, and this act has been done by the plaintiff, the creditor, without the consent of the surety, I hold that he

(1) Law Rep. 7 C. P. 9.

has thereby discharged the surety, and this action is therefore not maintainable.

BRAMWELL, B. It is clear that when a debtor is released and discharged by the act of the creditor, that is, when he can plead in bar to an action by a creditor that creditor's voluntary act, a joint debtor, though the obligation be joint and several, can plead the same matter in bar. Has the plaintiff done this? I think he has. He has executed a deed whereby he releases Thomas Jones in like manner as if he had got his discharge in bankruptcy. Would that be a good bar if pleaded by Thomas Jones to an action brought by the plaintiff against him? Why not? In terms it releases, but it adds "in like way as if the discharge in bankruptcy had been obtained;" but such a discharge would have been a bar to an action by the now plaintiff against him. Therefore he releases him in like manner as an order of discharge, which would have been a bar, would operate. Therefore the plaintiff has released Thomas Jones, and so has released the defendant or furnished the defendant with a bar. This construction gives effect to the words "in like manner as a discharge in bankruptcy," because those words give the plaintiff a right to retain any lien or security he has got, which right he would not have if he had given a simple release. The plaintiff proposes to read this as though the words were "I release you with no other consequence than a discharge in bankruptcy would have." In that case it might be that those words would qualify the release, and turn it into a covenant not to sue. But those are not the words. They are, "I release you as though you had got a discharge in bankruptcy." This is no technical view of the case. I think it extremely probable that the parties meant what I say they have said. I have not noticed the fact that the defendant says he was a surety; had he been only a surety and not a joint debtor, I think he would have been discharged on the principle I have mentioned, viz., that the plaintiff by his own act had given a bar to the principal debtor.

PIGOTT, B. (1) This was an action on a bond, and the plea

(1) Pigott, B., stated that Channell, B., who heard the argument, but before judgment had ceased to be a member of the Court, concurred with him that judgment should be for the plaintiff.

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stated that the bond was a joint and several bond of the defendant and one Thomas Jones, and that it was executed by the defendant as surety only for the said Thomas Jones; that after the execution of the bond a deed of composition was made between Thomas Jones of the one part, and the plaintiff and one Ackerman on behalf and with the assent of the creditors of said Thomas Jones of the other part; whereby Thomas Jones conveyed all his estate to the plaintiff and Ackerman to be administered for the benefit of his creditors "in like manner as if Thomas Jones had been at the date thereof adjudged bankrupt," and in consideration of the premises each of the creditors did release Thomas Jones from his debts "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." It then averred that the plaintiff executed the deed without the consent or request of the defendant.

To this plea there was a demurrer, and the question is what is the effect of the release given in the deed by the plaintiff to Thomas Jones. The law, since the decision of *Kearsley* v. *Cole* (1), has been settled to this effect, that in a composition deed between a debtor and his creditor the latter may reserve his remedies against a surety, and thus prevent the latter from being discharged. "The reservation of remedies has that effect upon this principle," says Baron Parke in his judgment; "first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired; the injury to such rights being the other reason. For the debtor cannot complain, if the instant afterwards the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is impliedly consent that the surety shall have recourse against him." In the recent case of *Bateson* v. *Gosling* (2), Willes, J., also says, "If the principal debtor consented to the creditor having recourse to the surety, the latter would not be discharged, and would have his remedy against the principal debtor;" and concludes thus: "It comes round, then, to this, that if the principal debtor be absolutely discharged of the debt, the creditor can have no remedy against the surety." Such being the law on this subject,

(1) 16 M. & W. 128. (2) Law Rep. 7 C. P. 9.

the present question (as I think) is one of construction, namely:— is the principal debtor absolutely discharged of the debt by this deed, or is it only a composition of and a personal discharge from the principal creditor's claim? Of course this depends upon the meaning of the language they have used; they are not bound to use the precise language of courts of law, it is enough if they express themselves so that their meaning can be ascertained. It is as follows, "each of the creditors doth by these presents release the said Thomas Jones from his debts;" if the release stopped there it would be clear enough, but the release has this additional language, viz., "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." Now the words "in like manner," &c., are not redundant, but obviously are introduced for some object, and we are bound to give them some application if they are capable of it; and there is an application. He retains his securities, and if they do not qualify the words of release, what meaning can be given to them? If this plaintiff, instead of having a surety to resort to for this debt, had had a pledge for it, how could it be contended that under such a form of release as this he could be taken as intending to give up his pledge? But if the release be absolute, he would be so bound (vide *Cowper* v. *Green* (1)), Then, if his pledge is reserved to him, why is not the right to resort to a surety? I cannot see how this form of release makes any distinction between them. "In like manner" must mean in the same way, or to the same extent; and I think that composition having now taken the place of bankruptcy proceedings very much gives the key to this form of release, and that the parties evidently meant to give and to receive under this deed a release having a similar effect to a discharge in bankruptcy as between those covenanting parties, and no more; the right to retain the pledge and also resort to a surety being in such case preserved. If the latter in his turn sues the debtor, he is only in the same position as if he had agreed to a reservation of remedies in the most precise terms, or as if the principal creditor had expressly covenanted only not to sue him, or that the discharge should be personal only. We know that it is the object of the legislature not to drive debtors into a bankruptcy court. And there can be no hardship upon the debtor

(1) 7 M. & W. 633.

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in giving effect to his own covenant, for he has chosen to compound upon those terms, the best he could make, and they are obviously just as between all parties. Nor can the true construction of a covenant entered into between parties be made to depend upon any rules of pleading. If they have agreed to a qualified or personal discharge of the debtor only, it cannot be turned into an absolute one against their intention by any form that the pleadings can take.

The true construction of their language must govern their rights, and where their language is inaccurate, still it is to be expounded ut res magis valeat; but to give no meaning to the language, when it is plainly capable of it, would be at variance with every rule of exposition. For these reasons, I think the plaintiff is entitled to judgment.

Judgment for the defendant.

Attorney for plaintiff: *W. M. Hacon.*
Attorney for defendant: *C. J. Allen.*

Jan. 23.

OSBORN *v.* GILLETT.

Negligence causing Death—Actio personalis moritur cum personâ—Master and Servant.

A master cannot maintain an action for injuries which cause the immediate death of his servant.

Declaration against defendant for injuries caused to E., plaintiff's "daughter and servant," by the negligent driving of defendant's servant, by reason whereof she afterwards died; claiming as special damage the loss of E.'s services, and her burial expenses.

Pleas, 3, that E. was killed on the spot.

4. That the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted. On demurrer to these pleas:—

Held, first (by Kelly, C.B., and Pigott, B.; Bramwell, B., dissenting), that the 3rd plea was good; secondly (by the whole Court), that the 4th plea was bad.

DECLARATION, stating that at the time, &c., and thence until the time of her death, one Elizabeth Osborn was the daughter and servant of the plaintiff; that the defendant by John Broadwater his servant negligently drove a waggon and horses against

the said Elizabeth Osborn, whereby she was wounded and injured, and by reason thereof afterwards died; whereby the plaintiff lost the service of the said Elizabeth Osborn, and the benefits and advantages which would otherwise have accrued to him from such service, and was put to expense in conveying to his house the body of the said Elizabeth Osborn, and was afterwards and necessarily put to and incurred expense in preparing for, and in and about and incidental to the burial of the same.

Pleas, 3, that the said Elizabeth Osborn was killed upon the spot by the acts and matters mentioned in the declaration, so that the plaintiff did and could not sustain any damage which entitles him to sue in this action for the acts complained of.

4. That the acts and matters complained of in the declaration amounted in law to a felonious act by the said John Broadwater committed; and Broadwater at the commencement of this suit had not, and has not since, been tried, convicted, or acquitted of, nor in any manner prosecuted for, the said offence, although nothing ever existed to render such prosecution unnecessary, improper, inexpedient, or to entitle the plaintiff to sue in this action without the same having taken place.

Demurrer and joinder.

Nov. 13. *Graham*, for the plaintiff. The fourth plea is clearly bad. *White* v. *Spettigue* (1) established that the rule as to the right of action being suspended by the felony, whatever its extent may be, was, at any rate, not applicable except between the party injured and the criminal himself; and the late case of *Wells* v. *Abrahams* (2), in which all the authorities were reviewed, makes the whole rule very questionable. The third plea is also bad. No question can be raised on this demurrer as to whether there was in reality a service. The declaration alleges it as a matter of fact, and it is a fact which very slight circumstances will suffice to prove: *Evans* v. *Walton*. (3) No allegation need be made as to the nature of the service: *Martinez* v. *Gerber*. (4) It is, however, contended that no action can be brought because the plaintiff's daughter was killed instantaneously. But the plaintiff is not

(1) 13 M. & W. 603.
(2) Law Rep. 7 Q. B. 554.
(3) Law Rep. 2 C. P. 615.
(4) 3 M. & G. 88.

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the less damaged because he loses the services of his daughter at once.

[BRAMWELL, B. Are you not entitled to throw the burden of argument on the other side? It is admitted that if the servant lives for six months the master would have had an action. Why has he not one because the servant dies at once?

KELLY, C.B. Could an annuitant bring an action for the killing of the cestui que vie?

BRAMWELL, B. No; because there is no legal relation between the two.]

The notion that an action cannot be brought in such a case seems to be founded on what is said in *Higgins* v. *Butcher* (1); but in that case the action was brought for injuries to the plaintiff's wife, whereby she was killed, and the argument was that the husband could not sue because in such an action it was necessary to join the wife. No such argument can apply here, for the master cannot join the servant in suing. The servant may sue for the injury done to himself, and to this action the master is no party; the master may sue for loss caused to him by the injury to the servant, and to this the servant is no party. The damages recovered by the one can never be any recompense for the loss sustained by the other. Further, what is said in *Higgins* v. *Butcher* (1) is very much involved with the question as to the effect of a felony on the power to sue, on which point its authority is shaken by *Wells* v. *Abrahams*. (2)

Prentice, Q.C. The fourth plea is within *Higgins* v. *Butcher* (1); but the third plea is, at any rate, good. The maxim applies, actio personalis moritur cum personâ. The policy of the law refuses to recognise the interest of one person in the death of another, and no instance can be produced of an action having been brought in respect of the death of a person before Lord Campbell's Act. In *Baker* v. *Bolton* (3) it was laid down by Lord Ellenborough that "in a civil court the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." This view is in conformity with what was thrown out in *Higgins* v. *Butcher* (1), and

(1) Yelv. 89. (2) Law Rep. 7 Q. B. 554.
(3) 1 Camp. 493.

it has been followed in the American courts in *Eden* v. *Lexington and Frankfort Ry. Co.* (1) and in *Carey and Wife* v. *Berkshire Ry. Co.* (2), where the earlier case of *Ford* v. *Monroe* (3) was discussed and dissented from (4). Lord Campbell's Act (9 & 10 Vict. c. 93) also amounts to a legislative declaration that it is the law that the action dies with the person; if it were not so, the Act need not have been passed, nor could it have been truly recited in the preamble that "no action at law is now maintainable against a person who by wrongful act, neglect, or default, may have caused the death of another person." The legislature has considered the matter, and has carefully limited the relief which it has provided.

Graham, in reply. The plaintiff's interest is not in the death of his servant, but in her life, and of the benefit of this the defendant's act has deprived him. Lord Campbell's Act only had in view the case of the right of action of the person killed, and the persons for whom that statute makes provision are persons who would have had no action in his lifetime for injuries done to him. Neither the statute, therefore, nor the preamble—which has regard only to the matter of the statute—affect this question. At least the plaintiff is entitled to recover for the expense of burial, for he was compellable by law to bury his child: *Reg.* v. *Vann.* (5)

Cur. adv. vult.

Jan. 23. The following judgments were delivered:—

PIGOTT, B. There are demurrers to the third and fourth pleas in this case. The action is brought for negligent driving by the defendant's servant, whereby Elizabeth, the daughter and servant of the plaintiff, was injured and killed, and in consequence the plaintiff lost her services, and was put to the expense of burying her.

By the third plea the defendant says that she was killed on the spot, and the first question is, whether this plea affords a good defence in law to an action by a master for damage sustained by reason of the death of his servant. It may seem a shadowy distinction to hold that when the service is simply interrupted by

(1) 14 B. Monroe, 204.
(2) 1 Cush. (Mass.) 475.
(3) 20 Wend. 210.
(4) See Angell on Carriers, § 600.
(5) 2 Den. Cr. C. 325; 21 L. J. (M.C.) 39.

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accident resulting from negligence the master may recover damages, while in the case of its being determined altogether by the servant's death from the same cause no action can be sustained. Still I am of opinion that the law has been so understood up to the present time; and if it is to be changed it rests with the legislature and not with the courts to make the change.

It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to shew that the general understanding had been to the effect laid down by Lord Ellenborough, in 1808, in *Baker* v. *Bolton.* (1). That was, no doubt, a nisi prius decision; but it does not appear to have ever been questioned. The ruling was, that the death of any human being could not be complained of as an injury—i. e., as an actionable injury; and the law as then laid down has found its way into the various text-books treating upon master and servant: 2 Chitty on Pleading (7th ed.), p. 488, n. There was nothing in that case to shew that the negligence amounted to a felony, and, if death is caused without criminal negligence or by merely injudicious driving, it would not.

But, in addition to this authority, and the general acquiescence in it for so many years, there is a clear parliamentary recognition and statement that such is the law to be found in the preamble to Lord Campbell's Act, 9 & 10 Vict. c. 93. The language is not confined to cases to which the maxim "actio personalis moritur cum personâ," applies, but is perfectly general:—

"Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him."

The remedy is then given to the deceased's personal representatives for the benefit of wife, husband, parent, and child only. Yet it must be manifest that numerous other cases in which special damages of various kinds are sustained (master and servant being one) must have been present to the mind of the framers of the statute, and, if such had been the intention, an express remedy

(1) 1 Camp. 493.

would have been afforded in cases where proximate special damage resulted from the death so caused.

Several American authorities were also cited which shew that the law in America has followed the ruling of Lord Ellenborough (*Eden* v. *Lexington and Frankfort Ry. Co.* (1); *Carey and Wife* v. *Berkshire Ry. Co.* (2)), but I do not think it necessary to rely upon these. The result is, in my opinion, that we are not at liberty to disregard the law thus established so long ago and expressly recognised by the legislature, nor in effect to add by the decision of this Court another clause to Lord Campbell's Act. For these reasons as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial.

I think the fourth plea is bad, for the reasons given on the argument—viz., that it only affords a defence, if at all, when the action is brought against the supposed criminal and before prosecution.

BRAMWELL, B. (3) The fourth plea in this case is clearly bad, *White* v. *Spettigue* (4) is in point. Indeed, this case is stronger. There the plaintiff was owner of the books, and it may be said it was in some sense his duty to prosecute the man who stole them; but in this case I see no greater duty in the plaintiff than in any one else to prosecute for the supposed felony.

I think the third plea bad also. The declaration shews that the deceased was the plaintiff's servant, that by a wrongful act, for which the defendant is responsible, she was wounded and killed, and that thereby the plaintiff lost her services and sustained damage which may be real and substantial from the valuable character of the service, prepayment of the wages, or otherwise. The plea admits all this, but says that the wrongful act and death of the servant were at the same moment of time. On this plea it is not alleged that the killing was manslaughter, and as against the defendant it must be taken it was not, for it is not alleged, and there may be a killing under circumstances of sufficient negligence to maintain an action if death had not ensued, though the negligence is not criminal so as to render the killing manslaughter.

(1) 14 B. Monroe, 204.
(2) 1 Cush. (Mass.) 475.
(3) This judgment was read by Pigott, B.
(4) 13 M. & W. 603.

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Now, these pleadings shew a state of things such that if the loss of service had arisen from the servant being injured, maimed, crippled, or otherwise disabled from work, but not killed, the action would be maintainable (see *Hodsoll* v. *Stallybrass* (1)), and the only question is, whether the loss arising from a killing makes any difference. It is important to bear this in mind, as it gets rid of all the suggested difficulties about the impolicy of such action being maintainable, and about the unreasonableness of its being maintainable when an annuitant for a man's life could not maintain an action for the wrongful killing of the cestui que vie. Because, supposing we could entertain such a consideration, this action is no more against good policy than one would be where the servant was crippled but not killed; and in the supposed case of the annuitant he could maintain no action for a wrongful crippling or disabling of the cestui que vie, whereby he could not pay the annuity, which, indeed, might have been granted to last during good health. Here a relation is shewn to exist between the plaintiff and the servant in respect of which, if the master sustains damage in consequence of a wrongful act which injures the servant, the law gives the master a right of action, and the only question is, whether to that general rule there is an exception where the servant is killed. I asked why there should be; no reason was or could be given, except the supposed impolicy; but it was said to be a positive rule of law that where a damage was caused by death no action lay. The burden of shewing this is on the defendant, who asserts it. He has to make out an exception to a general rule, and as no reason can be given for it, it seems to me to require very clear authority.

Mr. Prentice, for the defendant, relied, first, on the general rule or maxim, "actio personalis moritur cum personâ." But that clearly means dies with the person who was to be party to the action as plaintiff or defendant. Dies with the person. What person? It is not any person or every person. If the servant here had lived six months, and during that period service had been lost, this action would clearly be maintainable, though she then died. Further, the maxim is "actio moritur," which supposes it was once alive, but here the argument is that the plaintiff never had any action. In effect the plaintiff's case is, "You killed my

(1) 11 A & E. 301.

servant and caused me loss;" and the defendant's case is the same, "I did kill her, and therefore never was liable." The sense in which I say the maxim is to be understood is that put on it by Mr. Broom and the many authorities he cites in his Maxims (5th ed. p. 904).

Next, Mr. Prentice relied on the recital of 9 & 10 Vict. c. 93, that "no action is now maintainable against a person who by his wrongful acts may have caused the death of another person." And certainly the words are large enough to include this case. But in justice to whomsoever is responsible for it, we ought to see what was the subject-matter being dealt with. When that is done it will appear manifest that such a case as this was not in contemplation. For (it is somewhat strange) the section proceeds to say that wherever the death of a person shall be caused by a wrongful act, and the act "is such as would (if death had not ensued) have entitled the party injured to maintain an action," there the person who would have been liable if death had not ensued shall be liable, "notwithstanding the death of the party injured," that means killed; so that the death is to make a man liable to an action notwithstanding the death. But that the words "party injured" in the phrase "would have entitled the party injured" must mean the same as where they again occur, and, therefore, mean "party killed," the present case would be comprehended in this enactment; for the plaintiff is a "party injured." But it is manifest by s. 2 that the cases the statute is dealing with are cases where no action lay by the representatives of a deceased person to recover damages for his being wrongfully killed, and to this the recital must be limited. Further, with all respect to the legislature and the author of this section, I require stronger authority for the anomaly the defendant contends for, than a loose recital in an incorrectly drawn section of a statute, on which the Courts had to put a meaning from what it did not rather than did say: *Franklin* v. *South Eastern Ry. Co.* (1)

The next authority relied on was *Baker* v. *Bolton* (2). Now, certainly, as reported, it favours the defendant's view, for Lord Ellenborough is reported to have said that "in a civil court the death of a human being could not be complained of as an injury, and in this case the damages as to the plaintiff's wife must stop

(1) 3 H. & N. 211, at p. 214. (2) 1 Camp. 493.

4 Jur. N.S. 565

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with the period of her existence." The report is very short, and I am by no means sure of its accuracy. For though the evidence is that the wife assisted in the plaintiff's business, the special damage alleged does not contain any damage to the plaintiff's business, and Lord Ellenborough is reported to have said that the jury could only take into consideration the plaintiff's hurts and the loss of his wife's society and distress of mind till the moment of dissolution. But why was not the plaintiff entitled to recovery for the loss of a month's assistance, and how was he entitled to recover for distress of mind at all? and especially why up to the time when that distress must have become greatest by the death? This is only a nisi prius case, the plaintiff got 100*l.*, and probably was content. No argument is stated, no authority cited, and I cannot set a high value on that case, great as is the weight of the considered and accurately reported opinions of Lord Ellenborough after argument. The reporter puts a most significant query (1), — Why should the answer to it be "Yes," as the defendant contends?

The next authority cited by the defendant is *Higgins* v. *Butcher* (2). According to that report the plaintiff shewed no damage to himself. He said his wife was beaten and died, to his damage. This shews no pecuniary damage to him. Then Tanfield, J., expresses an opinion which was overruled in *White* v. *Spettigue* (3), and which, as it does not give as the reason that death gives no cause of action, may be said by its silence on that to be in defendant's favour. The same case is reported by Noy (4) who states the declaration, and in that report also no damage to the plaintiff is shewn. Then the Court say the king is to punish a felony, and Tanfield, J. is stated to have said that the action will not lie because the wife is dead, and she ought to have joined in the action, but otherwise if a servant. This is rather an authority for the plaintiff than the defendant. This case is mentioned by Twisden in *Cooper* v. *Witham* (5), as depending on the act being a felony.

(1) *Quære.*—If the wife be killed on the spot, is this to be considered damnum absque injuriâ, 1 Camp. at p. 494.

(2) Yelv. 89.

(3) 13 M. & W. 603.

(4) Noy, 18.

(5) 1 Lev. 247.

The remaining authorities are American, not binding on us indeed, but entitled to respect as the opinions of professors of English law, and entitled to respect according to the position of those professors and the reasons they give for their opinions. The first case in date is in 1 Cush. 475, a case in the Supreme Court of Massachusetts. In one of the cases there reported, *Skinner* v. *Housatonic Ry. Corp.*, an action was brought by a father to recover damages for the loss of his son's service, killed by the negligence of the defendants by an act not felonious. In the other case, *Carey and Wife* v. *Berkshire Ry. Co.*, an action was brought by a widow to recover damages for the death of her husband, killed in like way. It seems strange that the two cases are supposed to present a single question only for the Court, while it is obvious that the case of master and servant raises a different question from that of wife and husband. Nor do I understand why the plaintiff in the father's case, unless there was no damage to the father as master, was nonsuited. That looks as though he had not proved some fact, possibly he had not proved damage, for the child was eleven years old only, and it is nowhere said there was any damage. If so, the decision is right. But the judgment is, "If these actions, or either of them, can be maintained, it must be on some established principle of the common law." Now, that is true, and the principle is injuria and damnum, for which the defendant is responsible. The judgment proceeds, "and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel and we cannot find any. This is very strong evidence that such actions cannot be supported." With great respect, the error of this reasoning is in supposing the burden of proof or argument is on the plaintiff. The general principle is in his favour, that injuria and damnum give a cause of action. It is for the defendant to shew an exception to this rule when the injuria causes death. If the case had been viewed in this way, the reasons of the Court tell for the plaintiff. For in my judgment the exception is not upon any established principle of the common law; it is not applied in any adjudged case in

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the English books; it is not stated in any elementary treatise. They then cited and relied on *Baker* v. *Bolton* (1), on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the Court, but suppose it may have passed sub silentio. I cannot be satisfied with this decision. The reasoning seems wrong and the authority relied on insufficient.

The other case, *Eden* v. *Lexington and Frankfort Ry. Co.* (2) is in the Kentucky Court of Appeal. This was an action by a husband for the negligent killing of his wife. It is obviously, therefore, not in point. There is no relation of master and servant. If the wife had lived, she must have joined in the action, except to the extent of the husband's pecuniary loss for medicine, &c. But in the judgment the case of master and servant is mentioned. I do not very clearly understand it. The first position was, that the rule that no action lies for a felonious act before prosecution does not prevail in Kentucky The second is this:—"But, according to the principles of the common law, injuries affecting life cannot in general be the subject of a civil action. In other inferior felonies the civil remedy is merely suspended until after the conviction or acquittal of the supposed felon. But for injury to life the civil remedy is considered as being entirely merged in the public office." This was said to be the established common law doctrine in the case of *Baker* v. *Bolton.* (1) It is true Lord Ellenborough is reported to have said that in a civil court death could not be complained of as an injury. But there is nothing else to justify the above opinion, and if this is the authority, *White* v. *Spettigue* (3) shews its inapplicability here. The judgment proceeds:—"The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence that, the cause of action having itself abated, no separate action can be maintained for such damages as are exclusively consequential." I have dealt with this argument before. It is this:—"Wrongful death which causes a damage gives no action because it is death which causes it." The judgment proceeds to say "that damages may be recovered up to the time of death, but not beyond." The reason of this seems to be that all injuries affecting

(1) 1 Camp. 493. (2) 14 B. Monroe, 204. (3) 13 M. & W. 603.

life caused by the misconduct of another person involve the commission of a public wrong, which merges the remedy for all private loss arising after death has occurred and occasioned by it. Why every death caused by misconduct is to be assumed to be a public wrong I know not. The misconduct may be actionable, though not criminal negligence. Nor do I know why, however this may be, the remedy for private loss should merge in it.

I do not like criticising a variety of authorities, and escaping from their general effect by a variety of small differences and objections. But in this case it seems to me that the principle the plaintiff relies on is broad, plain, and clear—viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should shew a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither. With the exception of a short note of the case of *Baker* v. *Bolton* (1) there is no semblance of an authority on this side of the Atlantic, and the cases from the other side are merely founded on that one, and some vague notion of merger in a felony. I may observe that Mr. Smith, in his excellent work on Master and Servant (3rd ed. p. 139), assumes as certain that this action would lie.

On the main question, then, I think the plaintiff entitled to judgment; but it seems to me clear that he is entitled to the burial expenses. He says in his declaration that he necessarily incurred expenses in the child's burial. This must be taken to be true, if it can be. Now, *Reg.* v. *Vann* (2) shews he was bound to bury the child if he had the means, which he may have had. On this the judgment in the case of *Eden* v. *Lexington and Frankfort Ry. Co.* (3) is express; so also in *Baker* v. *Bolton* (1) the plaintiff recovered for loss up to the wife's death. In my opinion the plaintiff is entitled to judgment.

KELLY, C.B. I think the defendant is entitled to the judgment of the Court upon the demurrer to the third plea. No decision is to be found in the books from the earliest times by which an action

(1) 1 Camp. 493. (2) 2 Den. Cr. C. 325; 21 L. J. (M.C.) 39.
(3) 14 B. Monroe, 204.

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for this cause has been sustained. No dictum is to be found by any judge or upon any competent authority that such an action is maintainable. All the authority that exists is against it. *Higgins* v. *Butcher* (1) shews that a husband cannot maintain an action against one who kills his wife; and—by Tanfield, J.—a master has no action against one who kills his servant, though he loses his services. Here, however, the decision proceeds on the ground that the act is a felony: but upon this it may be observed that so would be the killing in the case before the Court if the act be such that the negligence makes it amount to manslaughter. In *Baker* v. *Bolton* (2) the facts are loosely stated, but they seem to shew that the action is founded on negligence, and that the plaintiff had been deprived of the assistance, which may mean the services, of his wife. But the decision did not proceed on the ground that the killing was a felony, Lord Ellenborough observing, without any qualification, that, "in a civil court the death of a human being could not be complained of as an injury." Then we have the American cases, *Carey and Wife* v. *Berkshire Ry. Co.*, and *Skinner* v. *Housatonic Ry. Corp.* (3) deciding that no action for loss of services is maintainable where death has been inflicted through carelessness. The case of *Ford* v. *Monroe* (4), the point not having been taken, and being a nisi prius case, is of no authority. Finally, we have the express declaration of the legislature in Lord Campbell's Act that no action lies for damages sustained by the death of a human being, and the language of the preamble shews that it was intended to include more than is provided for by the operative enactments of the statute. Such, then, being the state of the authorities, I agree with my Brother Pigott that we must leave it to the legislature to provide for a case like this, and that we ought not to take upon ourselves to create a new cause of action, which would be to make and not to expound the law.

Judgment for the defendant on the demurrer to the 3rd plea; for the plaintiff on the demurrer to the 4th plea.

Attorneys for plaintiff: *Sharpe, Parkers, & Co.*
Attorneys for defendant: *Flux & Leadbitter.*

(1) Yelv. 89.
(2) 1 Camp. 493.
(3) 1 Cush. (Mass.) 475.
(4) 20 Wend. 210.

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Jan. 29.

Shipping—Charterparty—Condition that Charterer's Liability shall cease.

A charterparty made by plaintiff to defendant contained the following clause:—"Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." In an action brought for demurrage at the port of loading:—

Held, 1. That the lien extended to demurrage at the port of loading, as well as at the port of discharge. 2. That the ship having been loaded, the charterer could not be sued for demurrage incurred during the loading.

ACTION brought in the Passage Court, Liverpool, to recover five days' demurrage and damages for fourteen days' detention at the port of loading, under a charterparty dated the 17th of January, 1872, by which Perasso, the master of the plaintiff's ship *Tridente*, chartered her to the defendant for a voyage with a cargo of coals from Birkenhead to Genoa, the ship to load "in fifteen working days" (subject to the usual exceptions of frost, &c.); the freight, at 13*s.* 6*d.* a ton, to be paid, one-third on signing bills of lading, the remainder on delivery of cargo; "the vessel to be discharged, weather permitting, at the rate of not less than thirty-five tons of coal per working day from the time of her being ready to unload, and ten days on demurrage, over and above her said laying days, at 8*l.* per day; the vessel to be consigned to the charterer's agent at the port of discharge, paying the usual commission of 2 per cent.; charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage."

The defendant pleaded, amongst other pleas, that the defendant's alleged liability for demurrage and detention was such liability as it was by the said charterparty provided should cease on the ship being loaded.

The vessel arrived at the docks where she was to load on the 12th of February, but the charterer did not commence loading her till the 13th of March, and the loading was not completed till the 23rd of March. Five days' demurrage had been recovered from the defendant in a previous action brought before the time for demurrage had expired. The present action was brought to recover the remaining five days' demurrage and damage for detention.

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A verdict was found for the plaintiff for 127*l.* 10*s.*, leave being given to the defendant to move to reduce the verdict by the amount claimed for demurrage.

A rule having been obtained accordingly,

T. H. James and *Kirby*, for the plaintiff, shewed cause. The defendant admits his liability for detention, but claims to be freed from his liability for demurrage by virtue of the concluding clause in the charterparty. But the lien extends only to demurrage at the port of discharge; it is not a substitute for vested causes of action. The demurrage accrues due de die in diem, and in fact the plaintiff has recovered for five days' demurrage during the loading. How can it be said that the defendant is in any better position with respect to the last five days than the first?

[BRAMWELL, B. The defendant may now say that the plaintiff got what he was not entitled to.]

Pederson v. *Lotinga* (1) and *Christoffersen* v. *Hansen* (2) are in favour of the plaintiff; and although *Bannister* v. *Breslauer* (3) is unfavourable to him, that case has been considerably shaken by *Gray* v. *Carr* (4) and *Christoffersen* v. *Hansen* (2). Here the defendant is not a mere agent, but charters as principal.

Goldney, for the defendant, supported the rule. The contention of the defendant is supported by authority: *Bannister* v. *Breslauer* (3) and *Gray* v. *Carr* (4) shew that the lien given for demurrage extends to demurrage at the port of loading as well as at the port of discharge; and *Pederson* v. *Lotinga* (1) is no authority to the contrary, for there were there two distinct provisions for demurrage, and it was on that ground that the lien was held only to apply to demurrage at the port of discharge. The lien therefore covers the whole of the claim, and the charterer, for whose liability the lien is substituted, is discharged. In *Christoffersen* v. *Hansen* (2) the defendant failed because he was sued for damages for detention, in respect of which no lien was given; but it is evident from what was said there, that if there had been a lien the decision would have been different. As to the defendant being

(1) 28 L. T. 267; 5 W. R. 290.
(2) Law Rep. 7 Q. B. 509.
(3) Law Rep. 2 C. P. 497.
(4) Law Rep. 6 Q. B. 522, at pp. 536, 546, 549.

principal, it was so also in *Bannister* v. *Breslauer* (1), where he was held discharged.

Cur. adv. vult.

Jan. 29. The following judgments were delivered:—

CLEASBY, B. (2) [After stating the facts and reading the concluding clause of the charterparty the learned judge proceeded:—] It has been for some time not unusual to have a similar clause in charterparties. Such a clause was probably introduced at first in cases where it appeared upon the charterparty that the charterer was only an agent; and in such cases it has been held that the charterer could not be sued for any delay in loading the cargo which was afterwards provided. In *Oglesby* v. *Yglesias* (3) and *Milvain* v. *Perez* (4) the language of the clause no doubt expressly excluded liability for default before and in shipping the cargo. There was no provision in those cases giving the shipowner any corresponding lien for demurrage, or anything in the nature of demurrage, but the Court of Queen's Bench held the owner bound by the clause as a part of the bargain. The words of discharge in those cases were the same as in the present, viz., that upon the loading of the complete cargo the "liability should cease." Mr. Justice Hill says in his judgment in the latter case (5): "In the present case, according to the pleadings, the defendants have shipped the cargo; the plaintiffs say that this has been done too late, for that they were bound to do it in regular turn; but the defendants by express terms, to which the plaintiffs have agreed, have stipulated that their liability shall cease as soon as they have shipped the cargo. We must give the plain effect to these plain terms, and hold that the alleged liability does not attach." In those cases the language was express that the liability should cease in respect of defaults as well before as after the

(1) Law Rep. 2 C. P. 497.

(2) This judgment was read by Cleasby, B. as the judgment of the Court (Martin, Bramwell, and Cleasby, BB.), the learned Baron saying that a judgment, which ought to be read, had been also prepared by Bramwell, B., but that it was mislaid; this latter judgment, having been found, was afterwards handed to the reporter.

(3) E. B. & E. 930; 27 L. J. (Q.B.) 356.

(4) 3 E. & E. 495; 30 L. J. (Q.B.) 90.

(5) 3 E. & E at p. 500; 30 L. J. (Q.B.) at p. 92.

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shipping of the cargo; and the only bearing of the cases upon the present is, that it was considered that the plain meaning of the words "liability to cease" was, not that the liability should cease to accrue, but that the liability should cease to be enforced. It further appeared in those cases that the charterer was acting as agent only; but this distinction is not so material, since it may be assumed that there was some reason for this stipulation, and unless the person interested in the goods to be delivered was a different person from the charterer there would be no object in it.

In the present case the language is general, that the charterer's liability should cease, and for the cessation of liability a corresponding benefit is obtained by the shipowner in having a lien upon a full cargo for demurrage, which he would not have unless expressly agreed. If then the words "liability to cease" are to be read in the same sense as in the cases referred to, the agreement discharges the charterer from demurrage at Liverpool, unless there be something in the charterparty to shew that demurrage at Liverpool could not be contemplated, which is certainly not the case.

The case of *Bannister* v. *Breslauer* (1) is very like the present one. In that case it did not appear upon the charterparty that the defendant was acting as agent, and there was no precise provision as to the breaches before and after loading, but the provision was general, that "the charterer's liability was to cease" (the same words as the previous cases and the present one) "when the cargo was shipped, provided that the same was worth the freight at the port of discharge, and the captain was to have an absolute lien on the cargo for freight, dead freight, and demurrage, which he or owner should be bound to exercise." These last words ("which he should be bound to exercise") have no bearing upon the question to which breaches the discharge is to be applicable. It was held that the discharge extended to demurrage at the port of loading as well as the port of discharge, and reliance is placed in the judgments on the word "demurrage" being used in the clause giving the lien, and there being nothing to limit it to demurrage at the port of discharge.

The reasons given for the conclusions arrived at apply to the

(1) Law Rep. 2 C. P. 497.

present case, and we should adopt the authority of that case unless there be some other decision inconsistent with it. We were referred to two cases on behalf of the defendant: *Pederson* v. *Lotinga* (1), and *Christoffersen* v. *Hansen*. (2) The first of those cases was decided in the year 1857. The charterparty provided that at the port of loading, after the agreed days for loading, the captain was to receive 5*l*. a day for demurrage, day by day. For the port of discharge the language was different. There was to be demurrage after the laying days at 5*l*. a day. It was considered that the express agreement that the charterer should pay 5*l*. a day, day by day, shewed that the clause providing that the owners should rest on their lien for freight and demurrage, must apply to the demurrage at the port of discharge. The judgments are founded upon the use of the words "day by day" in connection with the payment of demurrage at the port of loading; and there is nothing of that sort in the present case.

In the other case of *Christoffersen* v. *Hansen* (2) the words were general, that all liability of the charterer should cease as soon as he had loaded the cargo; and it was held that those words did not relieve the charterer from liability for delay in loading. But in that case no lien was given for demurrage or delay in loading; and this forms a main ground of the judgment of Blackburn and Lush, JJ. Mr. Justice Lush says pointedly (3), "If there were any provision giving the shipowner an equivalent advantage, that would be a very good reason for his absolving the defendant altogether. But there is no such provision." And he goes on to say that if he gave up the liability of the defendant for past breaches, he would have no remedy except against the foreign principal, not named and perhaps not known.

The claim now in question is not for detention but for demurrage, and the charterparty clearly gives a lien upon the complete cargo for all demurrage, both at the port of loading and of discharge.

Neither of the cases last referred to are at variance with the case of *Bannister* v. *Breslauer* (4), and we can give effect to the plain meaning of the words, viz. that upon the shipowner acquiring

(1) 28 L. T. 267; 5 W. R. 290.
(2) Law Rep. 7 Q. B. 509.
(3) Law Rep. 7 Q. B. at p. 516.
(4) Law Rep. 2 C. P. 497.

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a lien upon the full cargo for freight and demurrage, all liability of the charterer for both shall cease.

10 Q B 556

BRAMWELL, B. I think this rule should be made absolute. By the charterparty the charterer was entitled to a certain number of days on demurrage. This was applicable to the loading as well as to the unloading. Some of these days were consumed at the port of loading; and for a portion of them the defendant paid. The present claim is for the residue of the days so consumed at the port of loading. The charter contained a clause that on loading the cargo the charterer's responsibility should cease, the captain having a lien for freight and demurrage. It is impossible to say that this would not give a lien for demurrage incurred as well at the port of loading as at the port of discharge, and so for the demurrage sued for; and it seems impossible to hold that the matters as to which the liability was to cease were not the same as the matters as to which the lien was given. If so the defendant is discharged, and this action is not maintainable. *Bannister* v. *Breslauer* (1) is in point; or more than in point if the action there was one, not for an agreed sum for demurrage, but for unliquidated damages for delay in loading; and though that case has been questioned, it has not been overruled, and is binding on us. Nor is *Christoffersen* v. *Hansen* (2) opposed to this view. On the contrary, the Lord Chief Justice and Mr. Justice Blackburn rely on the absence of a lien for the matter as to which the right against the charterer is supposed to be given up. And Mr. Justice Lush's reasoning is very striking. He says (3): "If there were any provision giving the shipowner an equivalent advantage, that would be a very good reason for his absolving the defendant altogether." And so he holds liability for freight is given up, but not liability for damages for delay in loading, because there was a lien for freight, but none for such damages.

Mr. James for the plaintiff suggested that this demurrage was payable de die in diem, and that therefore a vested cause of action accrued which it could not be supposed it was intended to give up. The demurrage is not in terms payable de die in diem, and it may

(1) Law Rep. 2 C. P. 497. (2) Law Rep. 7 Q. B. 509.
(3) Law Rep. 7 Q. B. at p. 516.

be in point of law that none is due till it is known how much will be due. Here however all the days were consumed. But in order to give effect to clear words, we must hold either that the charterer's liability was contingent on his not loading a cargo, or that if a cause of action vested, it was defeasible, and divested on the loading of the cargo.

Rule absolute.

Attorney for plaintiff: *J. B. Wilson, Liverpool.*
Attorneys for defendant: *Forshaw & Hawkins, Liverpool.*

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Jan. 31.

Easement—Water—Natural and Artificial Stream—Riparian Owner.

A natural stream divided itself at a point called E. into two branches; one branch ran down to the river Irwell; the other passed into a farm-yard, where it supplied a watering-trough, and the overflow from the trough was formerly diffused over the ground, and found its way ultimately into the Irwell. The second branch appeared to have been made by artificial means, but was of immemorial age.

In 1847 W., the owner of the land on which the watering-trough stood, and thence down to the Irwell, collected the overflow into a reservoir, and conducted it by a culvert to a mill situated on the banks of the Irwell.

In 1965 W. became owner of all the rest of the land through which the second branch flowed.

In 1867 he sold the mill, with all water rights, to the plaintiff.

In an action brought by the plaintiff against a riparian owner on the stream above E. for obstructing the flow of the water:—

Held, that the plaintiff was entitled to maintain the action.

affirmed in Ex Ch 1 Q Ex 39

DECLARATION: That the plaintiff was possessed of certain land, and was entitled to the flow of certain streams or watercourses to and through the said land, and the defendants obstructed and diverted the water of the said streams or watercourses from the plaintiff's land.

The only plea on which anything turned was a plea traversing the plaintiff's title to the flow of the said streams or watercourses.

The cause was tried before Willes, J., at the Manchester Summer Assizes, 1872, and the following facts were then proved:—

From time immemorial two streams, flowing down to a piece of

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open ground called Buckden Ginnell, there joined, and the united stream passed on through the Broadwood Edge estate to a point at the back of Broadwood Edge farm-house, marked E on the map used at the trial. There it divided, and part flowed on to Buckden Farm, and thence to the river Irwell; and part to a farm called Silas Wilson's farm. The diversion of the stream at E appeared to have been artificially made, being effected in part by stones placed across the brook (called a "feather"); but there was no evidence when or by whom this was done, and so far as could be judged from the appearance of the stones, they had been there for many years.

The portion of the stream which flowed on to Silas Wilson's farm formerly passed into a farm-yard, where it supplied a watering-trough for cattle, the overflow passing away in no defined course, and ultimately finding its way, by ooze and percolation, into the river Irwell.

In 1845 a Mr. Walker became owner of the Lumn Hall estate, which extended from Broadwood Edge farm to the river Irwell. The estate comprised a cotton mill situated on the banks of the Irwell, which Walker proceeded to alter into a paper mill, and for the purpose of supplying it with water he made a reservoir to collect the overflow at the watering place on Silas Wilson's farm, and thence constructed a drain carrying the water down to the mill, where it was stored in lodges for use.

This was done in the year 1847.

In 1865 Walker purchased the Broadwood Edge estate.

In 1867 he conveyed to the plaintiff the Lumn paper mill, with a right to all springs, wells, and streams of water in, under, or upon, or arising or issuing in, from, or out of all or any part of the lands comprised in the Lumn Hall and Broadwood Edge estates, reserving to himself, his heirs and assigns, a supply of water for domestic and agricultural purposes.

All the lands traversed by the water were copyhold.

The defendant was owner of the land traversed by the two streams which united in Buckden Ginnell, and the act complained of was an obstruction by him of those two streams, the effect of which was that the water was thrown over the surface of the ground instead of running down to Wilson's Farm, and so on to the plaintiff's mill.

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A verdict was taken for 40*s.* damages, leave being reserved to the defendant to move to enter the verdict for him if the plaintiff was not entitled to maintain this action. A rule having been obtained accordingly,

Holker, Q.C., *Kemplay*, Q.C., and *Gorst*, shewed cause. There is nothing in principle to prevent the plaintiff from owning the right he claims. All the arguments used in favour of the plaintiff in *Nuttall* v. *Bracewell* (1) are applicable here, and that case is an authority for the present plaintiff. Indeed, the present case is stronger, for the branch which runs down from E to the trough is of a less artificial character than the goit in *Nuttall* v. *Bracewell* (1), and is of much older date. It cannot be denied that the owner of that branch could have sued for an obstruction; equally the owner of any part of that branch could have sued. If so, then the owner of the land where the water emptied itself from the trough and wasted itself on the ground was at liberty to collect the water into a channel, and the owner of that channel, which was but a continuance of the watercourse, can sue for any interference with the natural flow. If it is said that in *Nuttall* v. *Bracewell* (1) the plaintiff was a riparian owner on the main stream, the answer is, that it is plain he sued in respect of the goit, and as entitled to the passage of water down it, and in respect of this he was not a riparian owner on the stream. It would be as relevant to say here that the plaintiff is a riparian owner, as in truth he is, namely, upon the banks of the Irwell, into which both streams run. On the other hand, the case is plainly distinguishable from *Stockport Waterworks Co.* v. *Potter* (2), on the same ground on which that case was distinguished in *Nuttall* v. *Bracewell* (1). The plaintiffs there were not the owners of any land to which a natural stream ran, nor did they claim the right for any use connected with the land; but they claimed a licence or right in gross to take water from the stream for sale to and consumption by strangers. Here, on the contrary, the plaintiff comes within the ordinary description of grantee of a water right appurtenant to land. They also referred to *Proud* v. *Hollis*. (3)

(1) Law Rep. 2 Ex. 1. (2) 3 H. & C. 300. (3) 1 B. & C. 8.

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Pope, Q.C., Herschell, Q.C., and *Baylis,* in support of the rule. The case is really undistinguishable from *Stockport Waterworks Co.* v. *Potter* (1), which is a binding authority, and is right both on principle and on grounds of convenience. The right which a riparian owner has is only to use the water of the stream for ordinary purposes, or, by grant or prescriptive right, for extraordinary purposes: *Miner* v. *Gilmour.* (2) Walker, therefore, being owner of the land at E., could, no doubt, have maintained an action for any obstruction to or abstraction from the main stream on the banks of which he was owner. But this right was a right which he had as riparian owner, and which he could not retain if he ceased to be such, nor confer on any person who was not a riparian owner. The right to the water for ordinary purposes is attached by law to the ownership of lands on the banks of a stream, and is in its nature incapable of being communicated to others; the right to its use for extraordinary purposes is a supplement to the ordinary right, it is founded upon the same circumstance, the possession of riparian land, and can only be acquired by the same persons who can possess the ordinary right. In *Stockport Waterworks Company* v. *Potter* (1), which is the only case where a right of this kind has been claimed by a stranger under a grant, it was held that the right could not be supported. The reason of convenience is also strongly in favour of this view, for if such a right may be acquired by one, it may be acquired by five hundred persons, and if all such persons are to be treated as riparian owners, the liabilities of the true riparian owners higher up will be indefinitely increased, and no one of them can even alter in any degree the bed of the stream passing through his land without being liable to an action at the suit of every one of these grantees: *Bickett* v. *Morris.* (3) Again, the right of a riparian owner is to do whatever he will with the stream, including extraordinary uses, subject only to the right of those below him to object if his acts materially diminish the flow coming to them: *Sampson* v. *Hoddinott* (4); and in this respect also his opportunity of availing himself of that right will be indefinitely curtailed by allowing of the creation of numerous derivative

(1) 3 H. & C. 300.
(2) 12 Moo. P. C. 131, at p. 156.
(3) Law Rep. 1, Sc. Ap. 47.
(4) 1 C. B. (N.S.) 590, at p. 611; 26 L. J. (C.P.) 148.

12 Jur. N.S. 863.

rights of this nature. And although it is true that the possession of any portion of land, however small, on the banks of a stream will entitle the owner to riparian rights, it has never been decided that it will entitle him to the use of the water for the purpose of lands lying at a distance from the stream, and separated from the riparian land by intervening lands belonging to other owners; still less that it will entitle him to the use of the waters for purposes not really connected with such land as land. But even if it did, the necessity of possessing some riparian land would materially diminish the inconvenience which would be caused by the possibility of creating an indefinite number of water rights.

It is not possible to regard the watercourse, as it existed from E. to the trough, as a natural stream; it is evidently artificial in its origin, and the fact that it is an open cut does not make it of a different character from a supply drawn from the stream by pipes, as in *Stockport Waterworks Co.* v. *Potter*. (1) In each case the water would flow down naturally by the law of gravitation; and the fact that after supplying the purposes for which it was required at the cattle trough the stream ceased, and the overflow was allowed to waste itself on the surface, shews that it cannot be treated as a natural stream. Lastly, even assuming such a right as the plaintiff claims to be possible, it could only be acquired by prescription, and to this there are two answers; first, the conveyance of the water by an underground duct is not such an open exercise of enjoyment as will create a prescriptive right; secondly, the higher owners were in no way affected by the use, and therefore could not interfere; the only way in which they could have interrupted the user would have been by stopping the water, which would have exposed them to actions by all lower riparian owners.

In fact, there are only four ways in which the plaintiff can possibly claim the use of the water; 1, as riparian owner; 2, by his possession or taking of the water; 3, by grant; and 4, by prescription. As to the first, he is not a riparian owner, and therefore cannot claim as such. As to the second, *Laing* v. *Whaley* (2) shews that such a claim cannot be supported on that ground; see per Bramwell, B., in *Stockport Waterworks Co.* v. *Potter*. (3) As to

(1) 3 H. & C. 300. 10 Jur N.S. 1086

(2) 3 H. & N. 675, 901; 26 L. J. (Ex.) 327; 27 L. J. (Ex.) 422.

(3) 3 H. & C. at p. 318. 10 Jur N.S. 1007

(2) SC 4 Jur N.S. 930

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the third, the *Stockport Waterworks Case* decides that no such grant can give rights as against any one but the grantor; nor can any such grant be presumed here. As to the fourth, it is clearly agreed by the whole Court in the last-mentioned case (including Bramwell, B., who dissented as to the possibility of a right by grant), that such a right cannot be gained by prescription. *Nuttall* v. *Bracewell* (1) is clearly distinguishable on two grounds; first, the plaintiff was a riparian owner, and therefore capable of acquiring rights which a non-riparian owner cannot, and in fact he claimed as riparian owner, which the plaintiff here does not; secondly, the goit there was equivalent to a natural stream, and the case was therefore like the case put in the *Stockport Waterworks Co.* v. *Potter* (2), of a stream being made into two streams, which cannot be said in this case.

They also contended that, the land being copyhold, no such prescriptive right could be acquired.

KELLY, C.B. This rule must be discharged. The circumstances of the case, and the nature of the right claimed by the plaintiff, are as follows:—From time immemorial a stream of water has existed, on a portion of whose banks the defendants are possessed of land, and are therefore in respect of that land riparian proprietors. From the defendants' land the stream runs down to a point called, in this case, E., where a division takes place, and the stream branches out into two streams, the one running down till it reaches the river Irwell, the other running through Broadwood Edge-Farm to a place where formerly it emptied itself into a trough, and the overflow, without, so far as appears, forming any stream visible to the eye, diffused itself over the surface of the ground, and discharged itself by percolation through the surface, or found its way by small rills into the Irwell.

The plaintiff is possessed of land near to the Irwell, and of works, which are described as a paper-mill, all which he has purchased of one Walker; and when we inquire into Walker's title, we find that he was at the time of the sale the proprietor of a quantity of land which comprised both banks, and presumably therefore the bed, of the second branch of the stream from E. through the

(1) Law Rep. 2 Ex. 1. (2) 3 H. & C. at p. 327.

Broadwood estate to the site of the watering trough, and which continued on till it reached the Irwell.

There is no evidence as to when or how the branch of the stream which runs through Broadwood Edge came into existence. There is evidence on which a jury might find that it had existed from time immemorial. It is true that some stones, described as a "feather," are placed at the point of division, and it might possibly be inferred that these stones were placed there at some remote period to divide the stream, and create the branch which has now existed as far back as living memory goes. But these stones themselves appear to be of ancient date, and, if the cause of the division of the stream, must have been placed there at a very remote period.

We must, therefore, take up the case at the period of twenty-five years ago when Walker, who was then the proprietor of the land on both sides of the stream up to the point where it leaves Broadwood Edge estate, including the land on which the trough was situated, and the land further on towards the Irwell, determined to collect the overflow from the stream into a reservoir, and conduct it thence in a single stream into the land which abuts on the Irwell. First, then, had he a right to do this? and, secondly, if so, what was the effect of his act? There is one fact of very important bearing on the argument on both sides. Nothing that Walker did or could have done could take a single cubic inch of water beyond what naturally flowed out of the stream at the spot where the reservoir was made. Therefore, whatever were the rights of the defendants, Walker had not done anything which could prejudice them, or the rights of any riparian proprietors higher up the stream. If the stream had continued below the trough, and had passed into other persons' lands, and Walker had done any act to diminish the quantity of water that flowed to those lands, he might have incurred a liability; but taking the water at the trough could not have interfered with any one, because the water reached the land of no other proprietor. What, then, was the nature of his act? He found the stream entering his land as a stream, and at the trough ceasing to have that character. It did not, indeed, altogether physically cease, because the overflow was dispersed, for the most part sank into the ground, and the residue in a greatly diminished quantity found its way into the Irwell. That was a

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state of things injurious to the land, and to the health of those who might reside there, and Walker, intending to put an end to it, collected the water into a reservoir, and constructed a tunnel to carry the water out of the reservoir till it reached what are now the plaintiff's premises.

What rights, then, were acquired by Walker? If the defendants had, whilst Walker was still the owner of these premises, taken out of the stream unduly large quantities of water from the spot where their land abuts upon the stream, it is not disputed that Walker might have brought an action. Nor is it disputed that now the owner of the land on the stream between E. and the trough might for any act diminishing the quantity of water have brought an action. It is said, however, that the plaintiff is not the proprietor of any land abutting on the stream, and, therefore, not being a riparian proprietor, is not entitled to bring this action.

But I am of opinion that he or any one who was owner of the land through which this stream flowed, after the works which I have described were effected by Walker twenty-five years ago, and who was deprived of any of the water which from the time of those works being constructed he had enjoyed, would be entitled to maintain an action just as if they had been proprietors on the bank of a natural stream. And on this ground. What in the contemplation of law is the nature of this artificial stream or tunnel? Suppose that instead of a tunnel conveying the water into what are now the plaintiff's premises Walker had cut an open drain, and so made a stream visible on the surface passing through his land, and on into the Irwell. If he had done so, I am of opinion that he, or any one claiming under him through whose property this open stream passed, would have been as much entitled to the water running along it as if he had been the owner of land on the bank of the stream between E. and the trough. It would have been a mere continuance of the stream. But the cases upon this subject establish the proposition that there is no difference in the contemplation of law between a stream visible to the eye, and a stream conducted through a tunnel, nor any difference in the rights which may be acquired in them respectively. If this is so, on what ground is there any difference between the rights of the plaintiff in the stream which now flows to him through a tunnel,

and the rights which he would have had in an open stream passing into and through his land? I think there is none. And it is right to state, in order that no question may be raised on this point, that this stream has been enjoyed for more than twenty years. There may be something in the argument that the right to have a flow of water through his property under these circumstances can only be acquired by one who has enjoyed it for twenty years; but if that is so, any doubt on that point is here removed, for more than that period of enjoyment has elapsed.

It is not necessary to refer in detail to the cases which have been cited. This case is clearly distinguishable from the case of *Stockport Waterworks Co.* v. *Potter*. (1) If there were no other point of distinction it would be enough to say that there a diversion of water was made from the stream by a person who had no power to make it. It was not a taking by a riparian proprietor out of a stream for his own purposes, but the making of a new stream and carrying away the water in immense quantities for consumption elsewhere, the water being never returned into the same stream, but being taken to a place where the person taking it claimed to apply it entirely to his own purposes. That case was, therefore, quite different from the present one. On the other hand the case of *Nuttall* v. *Bracewell* (2) is, I will not say on all fours with the present case, but is not distinguishable from it on principle. It is enough to refer to the concluding words of Channell, B. (3), to shew that the present case is within it. I should also refer to the judgment of Bramwell, B., in that case, but that as he dissented from the judgment of the Court in *Stockport Waterworks Co.* v. *Potter* (1) it might be supposed that his mind was somewhat influenced by the view he had there entertained. Channell, B. concluded his judgment thus: "I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different; but that an artificial stream may be on the same footing as a natural one, as regards the right of riparian pro-

(1) 3 H. & C. 300. (2) Law Rep. 2 Ex. 1.
(3) Law Rep. 2 Ex. at p. 14.

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prietors, is held in *Sutcliffe* v. *Booth* (1)." On the ground, therefore, that this stream, though artificial in the sense that its bed was constructed by the hand of man and not by any natural agency, and that it flows not as a stream visible to the eye, but is conducted by means of a tunnel to the plaintiff's works from the spot where as a stream it formerly ceased, yet is a stream which all who possess property through which it flows are entitled to use, and of which they can only use so much as actually flows along the branch, I am of opinion that the plaintiff is entitled to maintain this action for the disturbance which the defendants' act has caused.

MARTIN B. I am of the same opinion. I understand it to be admitted that Walker could have maintained an action for this disturbance, but it is contended that the plaintiff cannot. What, then, were Walker's rights? He had a natural stream of water flowing from E. to the trough; a stream as to which no one can tell when it began, and which must therefore be treated as a natural stream. A man who has a natural stream of water flowing through his land has, in ordinary cases, a right to its flow, subject only to the ordinary use of the same by higher owners. They may use it for ordinary purposes, such as drinking, washing, watering their cattle, and so forth, and, perhaps, if it comes down to the lower owner materially diminished by that use, he must submit; ordinarily, however, this is not the case. Walker, therefore, was entitled to have the stream flow in its ordinary course down to the place where the trough stood, and beyond which, twenty-five years ago, it was not continued in a defined channel to the Irwell, but was allowed to dissipate itself over the surface of the ground. Now that state of things was exactly as if a stream lost itself in a marsh or swamp, a haunt for snipe and wild fowl, but not turned to any agricultural purpose. And I am of opinion that if a proprietor in such a case expends his labour in cutting a course for the water, he acquires a right analogous to that which he would have if that course had been a natural stream, and that no distinction can be made between a natural stream and a water-course made to drain land and to carry down the water to its

(1) 32 L. J. (Q.B.) 136.

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natural destination. But whether any such distinction can be made or not, there has here been an enjoyment of the course for twenty years, which will give the right to its enjoyment if it is necessary to rely on that.

An objection has been taken by Mr. Baylis that this land was copyhold, and that no easement can be acquired in copyhold by an enjoyment of any duration, however long. I will not go into that question, for my impression is that when a man cuts through a marsh a course for water, the stream is analogous to a natural stream.

If so, then Walker had a stream analogous to a natural stream flowing down to his works. Then the question is, can a person having such a right, assign it? What reason can be alleged why he cannot? He could assign a right of way in the like circumstances; why then cannot he give a right to use the water? If he can assign the whole of his land to which such a right is attached, why cannot he assign a portion with the same rights? I think the defendant has wholly failed to shew any reason why he cannot. It is objected that the stream is stopped in a reservoir, and then carried by a tail goit into the river. That may give those below the plaintiff (if any) a right to complain, but it can give the defendants none. The plaintiff had a right to use the water to any extent, provided those below, whose rights he interfered with, did not complain.

I cannot see that the case of *Stockport Waterworks Co.* v. *Potter* (1) has any bearing on this case,

PIGOTT, B. I am of the same opinion, and I think the argument of the defendants fails altogether. If there were here something equivalent to the end of a pipe inserted in the stream by a riparian proprietor, and the water were passed on to a licensee or assignee of the pipes, the facts would somewhat resemble those in *Stockport Waterworks Co.* v. *Potter*. (1) But that is not so. Here, on the contrary, there is a branch of the stream at E., where the main stream divides into two currents. There is no evidence as to the precise period when the plaintiff's branch was first made; but it was done beyond the time

(1) 3 H. & C. 300.

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of memory. There is, then, no ground for saying that this is a diversion of the stream, it was the stream itself which passed on from E. to the trough. Then, Walker, being the proprietor of the land lying on this branch, finding the water dissipating itself beyond the trough, collected it into a reservoir, and conducted it in pipes to the land which is now owned by the plaintiff, where it was carried on to the Irwell. In that state of things the water continued to pass along the new course till the land was sold to the plaintiff. Thus the plaintiff became possessed of this land with what is equivalent to a natural stream of water running through it. What had been a stream which could scarcely be traced had become a defined stream. Why, then, is not the plaintiff entitled to maintain this action for the obstruction by the defendants of the water which would naturally run along that channel? *Nuttall* v. *Bracewell* (1) shews that by turning a natural stream into a cut, you do not change the character of the right. The proprietor does not claim his right in a different way, but he claims the use of the water as the proprietor of land in, over, and through which there passes a natural stream, which has, by the expenditure of labour, been turned into an artificial channel. By taking away this water the defendants take away from the plaintiff what is perhaps as valuable and useful as any part of his estate. The defendants could not have abstracted the water as against Walker; and if so, why is the plaintiff not entitled to sue, who claims through Walker? He claims the water not as an easement, but as owner of the land through which it passes.

As to *Stockport Waterworks Company* v. *Potter* (2) I think it has no application to this case.

Rule discharged.

Attorneys for plaintiff: *Milne, Riddle, & Mellor.*
Attorneys for defendants: *Woodcock & Rylands.*

(1) Law Rep. 2 Ex. 1.

(2) 3 H. & C. 300.

MITCHELL *v.* HOLMES. 1873

Jan. 24.

Payment—Payment to Administrator—Payment prior to Letters of Administration being granted.

An annuity was directed by will to be paid to H. whilst living, by equal half-yearly payments, and a proportionable part of the annuity to be computed to the day of H.'s death, from the last preceding day of payment "to the executors and administrators" of H. A proportionate part, after H.'s death, was paid to the husband of H., but before he had administered to her estate, and he died without having done so, leaving his son his executor. The son administered to H.'s estate, and claimed the proportionate part of the annuity:—

Held, that the payment to H.'s husband was not a good legal payment, and that the son might recover the money.

Mitchell v. *Moorman* (1 Y. & J. 21) followed.

Semble, per Kelly, C.B., that the payment was not a good equitable payment.

DECLARATION in replevin.

Avowry, stating that one William Gibbons, being seised in fee of certain lands, by his will devised those lands to Edward Gibbons and his heirs, charged with the payment of an annuity of 20*l.* to one Jane Holmes for her life, which annuity the testator directed should be paid by "equal half-yearly payments; that is to say, on the 30th day of May and on the 23rd day of November in each year, the first half-yearly payment to be made to Jane Holmes, if living, on such of the said days of payment as should first happen after the end of six calendar months next after his decease, and to the executors or administrators of the said Jane Holmes, a proportionable part of the said annuity to be computed to the day of the death of the said Jane Holmes from the then last preceding day of payment. And the testator further directed that in case the annuity should be in arrear for forty days, it should be lawful for Jane Holmes and her assigns to enter and distrain. That William Gibbons died, leaving Jane Holmes surviving, who then became entitled to the annuity devised, and afterwards Jane Holmes died, and the defendant became her administrator; and there was then due to the defendant, as such administrator, 8*l.* 17*s.* 5*d.*, being the proportionable part of the said annuity to be computed to the day of her death; that the same remained in arrear for more than forty days; wherefore the defendant well averred, &c.

Plea: riens in arrear.

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Issue.

[There was another avowry of a distress in respect of 137*l.* 0*s.* 9*d.*, to which the Statute of Limitations was pleaded. The plaintiff replied a written acknowledgment, and upon this issue the defendant was successful.]

At the trial before Willes, J., without a jury, at the Durham Summer Assizes, 1872, it appeared that William Gibbons having, upon the 9th of April, 1821, made his will in the terms set forth in the avowry, died on the 7th of August, 1826. George Holmes, husband of Jane Holmes, the annuitant, and father of the defendant, was sole executor, and proved the will. Payments on account of the annuity were made from time to time in Jane Holmes's lifetime. She died intestate, on the 24th of April, 1866, and at that time 8*l.* 17*s.* 5*d.* was the proportionable part of the annuity due to her administrator, computed as directed by the will, from the last day of payment of the half-yearly instalment to the day of her death.

This sum was paid by the plaintiff to George Holmes who, however, had not then and never did take out letters of administration to his wife's estate. He died on the 10th of March, 1869, and the defendant was his executor, and also administered to the estate of Jane Holmes. It was not disputed that the distress had been levied on the proper land, and the only question in dispute was whether the payment to George Holmes, he never having taken out administration to his wife's estate was a good payment. If it was, there was nothing in arrear. The learned judge was of opinion that the payment was not a good one, and directed a verdict for the defendant. He refused to allow the addition of an equitable plea to the avowry, having considerable doubt as to whether the payment would be good in equity. At the same time he intimated that he did not desire to prejudice any application to amend which might afterwards be made to the Court upon motion for a new trial.

A rule was obtained in Michaelmas Term last for a new trial, on the ground of misdirection in this, that the judge ought to have held the payment to George Holmes sufficient, and for an amendment of the pleadings if necessary, by adding an equitable plea to the avowry.

Kemplay, Q.C., and *John Edge*, shewed cause, and relied upon *Mitchell* v. *Moorman*. (1)

[They were stopped.]

Crompton, in support of the rule, contended that the payment to the defendant's father was a good legal, or, at all events, a good equitable payment. Although no letters of administration were taken out by the father, a Court of Equity would not permit the defendant, who represented both the father's and the mother's estate, to say that such payment had not been made: *Cart* v. *Rees*, cited in *Squib* v. *Wyn* (2); *Attorney-General* v. *Partington* (3); *Betts* v. *Kimpton* (4).

KELLY, C.B. This rule must be discharged. The sum avowed for never belonged to Jane Holmes at all, but was made payable under the terms of the will of Gibbons to the "administrator" of Jane Holmes. The defendant's father, therefore, the husband of Jane Holmes, would have been entitled to the money, and able to give a valid discharge for it as soon as he had administered to his wife's estate. But he never took out letters of administration and died without having done so. After his death the defendant did administer to his mother's estate, and thus, under the terms of the will, became entitled to this money. It is said, and we must assume it as proved, that an equivalent sum was paid to the husband, the defendant's father. And it is argued that because the defendant is not only his mother's administrator, but his father's executor, a payment to the father, although he had never administered to his wife's estate, is a payment which the defendant must recognise. This is certainly not so at law, and with the position of the parties in equity, we cannot, upon these pleadings, deal; and we do not think the case one in which we ought to amend. I must add, however, that in equity also, I think the defendant's contention would fail, but it is not necessary to decide this point.

MARTIN, B. I am of the same opinion. The case cited by Mr. Kemplay is precisely in point. At law, therefore, the defendant is entitled to our judgment. And into his position in equity it is

(1) 1 Y. & J. 21.
(2) 1 P. Wms. 381.
(3) 3 H. & C. 193; 33 L.J. (Ex.) 281.
(4) 2 B. & Ad. 273.

(3 H & C 193 33 L.J. 825.

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unnecessary to enter. At this stage the pleadings ought not to be amended.

PIGOTT, B., concurred.

Rule discharged.

Attorneys for plaintiff: *Rogerson & Ford.*
Attorney for defendant: *John Tucker.*

Jan. 25.

FEATHERSTON *v.* WILKINSON AND ANOTHER.

Contract—Measure of Damages—Evidence—Onus of Proof.

The defendants, by charterparty, agreed with the plaintiff that their ship should, at a specified time, load 1300 tons of coal in the river Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had, in consequence, first to hire other vessels at an advanced freight, and, secondly, to buy 1300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre.

Held, that the fact of the plaintiff having paid the additional price was primâ facie evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover.

DECLARATION, that the plaintiff and defendants agreed, by charterparty, that the defendants' ship, the *Edith Emily*, should, with all convenient speed, sail to Northumberland Dock, on the river Tyne, and there, during the first or second week of January, 1872, load and receive on board 1300 tons of coal, which she should carry to Havre, and there deliver on payment of freight; that all conditions, &c., were fulfilled, yet the defendants made default, and the ship was not ready to load during the first or the second week in January, 1872, whereby the plaintiff was put to expense in chartering other ships and buying coal to load them with.

The defendants paid into Court 27*l.* 10*s.*, being the increased freight which the plaintiff had to pay, and denied all further liability.

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At the trial before Brett, J., at the Northumberland Summer Assizes in 1872, the following facts were proved:—

The plaintiff, a Newcastle merchant, on the 14th of December, 1871, entered into a charterparty with the defendants, shipowners at West Hartlepool, and owners of the *Edith Emily*, upon the terms set forth in the declaration. After the execution of the charterparty, the plaintiff went to the offices of the Bebside Colliery, at Newcastle, and verbally agreed with the manager there to take 1300 tons of coal at 10*s.* 6*d.* a ton in the first or second week of January, 1872. The *Edith Emily* was accordingly put on the "turn book" of the colliery for that time. Owing to the defendants' default the vessel lost her turn, and it was impossible, according to the custom prevailing in the Tyne of loading ships "in turn," for the plaintiff to obtain his coal until he had substituted vessels to carry it. As soon as was practicable, he loaded 1300 tons of coal in two other ships, instead of the *Edith Emily*, at an advanced freight of 27*l.* 10*s.*, paying, also, 1*s.* 6*d.* a ton extra for the coal. No evidence was given that he was under any contract to deliver at Havre at the lower rate, and it was contended by the defendants that they were not liable for the higher price which the plaintiff had to pay for the coal, inasmuch as he was in possession of an article which was proportionately more valuable. Although the price of coal at Newcastle was admitted to have risen, it was not proved directly that there had been a corresponding rise at Havre. A verdict was entered for the plaintiff for 97*l.* 10*s.*, the total additional price which he had to pay for the coal, with leave to move to enter a verdict for the defendants, the Court to draw inferences of fact. A rule was obtained accordingly in Michaelmas Term, 1872, on the ground that the damages sought to be recovered were too remote, and not in point of law recoverable.

Holker, Q.C., and *G. Bruce*, shewed cause, and contended that the plaintiff was entitled to recover the advanced price of the cargo; the mere circumstance that coals had risen at the pit's mouth was not enough to rebut the primâ facie evidence of loss. If the defendants had desired to shew that the 97*l.* 10*s.* had not really been lost, they should have called evidence to prove that the

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plaintiff either had or could have realised at Havre an equivalent increase.

Herschell, Q.C., in support of the rule. The plaintiff, by shewing merely the fact that he paid more for the coal, has not shewn damage. He should have shewn, also, that he could not realise an equivalent profit.

[KELLY, C.B. The coal might have been for his own consumption.]

If so, he should have proved the fact. The proper measure of damage is the difference of freight, and to charge the defendants with the enhanced price of the cargo is a novel head of damage upon breach of such a contract as the present one. No sub-contract by the plaintiff to deliver at the lower price was proved. Indeed evidence of such a contract would have been worthless unless the defendants were shewn to have had notice of the fact: *Hadley* v *Baxendale* (1). It is true that the defendants offered no evidence of the rise in coal at Havre. But the rise at the pit's mouth was not disputed, and the proper inference to be drawn by the Court is that a corresponding rise at Havre had taken place.

KELLY, C.B. I think this rule should be discharged. The plaintiff contracted with the defendants that they should be ready with their ship, the *Edith Emily*, to receive a cargo of coal on a certain day. The defendants broke their contract, and the consequence was that the plaintiff was obliged not only to charter vessels at an advanced freight, but also to buy coal at a higher price, the total difference in price amounting to 97*l.* 10*s.* Of this sum, therefore, he was a loser, unless evidence is offered to shew that in fact there neither was nor could be any loss. Primâ facie the evidence entitles him to recover that sum.

But it is contended, on the part of the defendants, that because the coal bought was worth the extra 1*s.* 6*d.* a ton given for it, there was no loss, inasmuch as although the plaintiff had paid 97*l.* 10*s.* more than he would have paid if the defendants had performed their contract, he could, upon re-sale, get back the extra price. But there was no satisfactory evidence given as to this

(1) 9 Ex. 341; 23 L.J. (Ex.) 179.

point. Coal had risen at the pit's mouth. It does not follow that the same rise had taken place at Havre. If it had, that circumstance might diminish the damages; but I think that the defendants ought to have given evidence upon the subject, if they desired to rely upon a rise at Havre. I agree that it is questionable, if the plaintiff, at all events upon the declaration as it stands, could have entered into evidence of a sub-contract. As the case is presented to us we have the plaintiff shewing an actual payment of 97*l.* 10*s.* extra. In my opinion the defendants should have met this evidence by other evidence, clearly shewing that the coal was bought not for consumption but re-sale, and that at Havre there had been a rise in the market corresponding to the rise at the pit's mouth. No evidence of the kind was offered; and I do not think we can, in its absence, draw the inference which has been suggested by Mr. Herschell. The plaintiff made out a primâ facie case of damage, to which the defendants attempted no answer.

MARTIN, B. I am of the same opinion. There was, in my judgment, evidence that the plaintiff had been damaged beyond the increased freight to the extent of 97*l.* 10*s.* The payment of that sum is some evidence that the plaintiff lost it; and the defendants should have offered evidence in contradiction, if they denied that that sum was really lost to the plaintiff. It is impossible to say that the amount is "not in point of law recoverable."

POLLOCK, B. I am of the same opinion. The plaintiff shewed that he was out of pocket to the extent of 97*l.* 10*s.* owing to the defendants' default. This is primâ facie evidence of damage, and any circumstance mitigating the loss, such as a rise in the market price of coal at Havre, ought to have been proved by the defendants, and not left to us to infer from a rise at the pit's mouth.

Rule discharged.

Attorney for plaintiff: *S. R. Hoyle.*
Attorneys for defendants: *Shum & Crossman.*

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Jan. 16.

ENGLAND *v.* COWLEY.

Conversion—Evidence—Preventing Removal of Goods.

The plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession, and afterwards went to M.'s house to remove them. Upon his arrival at the house he was met by the defendant, M.'s landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It was then after sunset, and therefore too late in the day to distrain, and the defendant intended to prevent the plaintiff from removing the goods, with a view of distraining on the day following. The plaintiff continued in possession of the goods, but made no attempt actually to remove them; and, except by intimating his intention to prevent their being removed, the defendant did not take possession of, or assume dominion over, them. In an action of trover:—

Held (by Kelly, C.B., Bramwell and Pollock, BB., Martin, B., dissenting), that there was no evidence of conversion:

(By Bramwell, B.) That an actual prevention by force of the removal of the goods would not have amounted to a conversion.

Trover for household furniture.

Plea: not guilty by statute (11 Geo. 2, c. 19, s. 21).

Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of, and remove and sell the furniture in case of default upon Miss Morley's part in payment of the sum advanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following. One of the men returned, and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the

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removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove any of the goods upon this occasion. His object was to prevent the plaintiff's removing them in order to distrain the next day at a legal hour.

The cause was tried before Bramwell, B., at the Surrey summer assizes, 1872. In summing up the learned judge directed the jury in the following terms: "If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of, nor assume dominion over, them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action." The jury answered this question in favour of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for 40*l.*, the value of the goods, if the Court should be of opinion that the learned judge ought to have directed a verdict for the plaintiff. A rule was obtained in Michaelmas Term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

Holl shewed cause. There was no evidence of a conversion. Throughout, the plaintiff had possession of his goods. All that the defendant did was to assert his right to prevent their removal, and if the plaintiff chose to yield and not remove them, that is not evidence of conversion. The same would be true if he had actually prevented their being taken out of the house. But he did not go so far. He only threatened to prevent the plaintiff from taking them away: *Fowler* v. *Hollins* (1); *Burroughes* v. *Bayne*. (2)

[MARTIN, B. In *Fouldes* v. *Willoughby* (3) Alderson, B., says, at p. 548, that any act "inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places," amounts to a conversion. Has not the defendant here done what is inconsistent with the plaintiff's general right?]

(1) Law Rep. 7 Q. B. 616. (2) 5 H. & N. 296; 29 L. J. (Ex.) 188.
(3) 8 M. & W. 540.

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No. He never was in possession of the goods. The act done must be either asportation or detention. The finding of the jury, moreover, really concludes the case.

Joyce, in support of the rule. It is impossible to say there was no evidence of conversion. There was a complete and effectual interference with the plaintiff's rights as owner. The jury have found, not merely that the defendant threatened to prevent, but that he did prevent, the removal of the goods. This was "an exercise of dominion over them inconsistent with the true owner's title:" see *Wilbraham* v. *Snow*. (1) It was an unqualified assertion of right which the plaintiff could only have questioned by force, and by which he was "wrongfully deprived of the use and possession of his goods" (see Common Law Procedure Act, 1852, sch. B., form 28).

[BRAMWELL, B. The form for a declaration in trover given in the Common Law Procedure Act, 1852, sch. B., which alleges that the defendant "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," does not enlarge the scope of the action. The alternative words were inserted at the suggestion of Lord Denman, with a view merely of explaining the nature of "conversion."]

The defendant's act amounted to a detention of the goods from the plaintiff.

POLLOCK, B. I am of opinion that this rule should be discharged. The defendant was never in possession of the goods. No doubt cases might be put where a wrong-doer, though not in actual possession, uses such force or contrivance as to interfere entirely with the dominion of the true owner; but here there was a mere assertion of right on the defendant's part. I think the plaintiff should have insisted upon removing the goods, if he intended afterwards to challenge the defendant's assertion in an action of trover. It is a sound rule of law which is laid down in Co. Litt. 253, b. where continual claim is treated of, that it is not every cause of fear which can excuse a person from not claiming his rights. The fear must not be a "vain feare." It must be "some just cause of feare." Now in this case the plaintiff proved no act of interference,

(1) 2 Notes to Saund. by Wms. pp. 87, at p. 108, n. (*a*).

but only a threat, which the plaintiff, if he meant afterwards to stand by his rights, ought to have resisted. Mr. Joyce has urged that the defendant detained the plaintiff's goods; but in fact he never had them to detain. He merely said, "You shall not remove them." That is not enough to furnish ground for this action.

BRAMWELL, B. I am of the same opinion. I think no action is maintainable, because the defendant did no act, but only threatened that, in a certain event, he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to stop him at his peril, when there might have been a cause of action of some sort. But further, even if the defendant had prevented the removal of the goods by physical force, I do not think trover would have been maintainable. The substance of that action is the same as before the Common Law Procedure Act, 1852, and although in the form of declaration there given in sch. B. the words used are, "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," the gist of the action is the conversion, as for example, by consuming the goods or by refusing the true owner possession, the wrong-doer having himself at the time a physical control over the goods. Now here the defendant did not "convert" the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. "You shall not remove them," he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention, still I think this action cannot be maintained. Take some analogous cases, by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, "You shall not take that pistol of yours out of the drawer," and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, "You shall not go that way, you must turn back;" and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one

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would call that a conversion of the watch by me. And really this case is the same with these. Illustrations of my meaning might be easily multiplied. The truth is that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that *something* shall not be done by the plaintiff; he must say that *nothing* shall. Now here there was no interference with the plaintiff's rights except the statement by the defendant that he would prevent the goods from being removed. This is not sufficient to furnish a basis for the present action. For it must be remembered that if the defendant is liable at all, it is for the value of the goods. But how unjust that would be! The plaintiff's man was left in possession. Miss Morley could not legally take away the goods. If she did, the plaintiff could maintain an action against her for their wrongful removal. Yet he is also to be able to recover their full value against the defendant. Moreover, I cannot but think that the jury really negatived all idea of conversion. "If you are of opinion," they were told, "that the defendant did not deprive the plaintiff of his goods, did not take possession of, nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing the plaintiff to remain in possession of them if he liked," then there is no cause of action. The jury answered this question in favour of the defendant. There had, therefore, been no general assertion of right to the exclusion of the plaintiff.

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1872, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house, with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but in order to have the opportunity of distraining he

told the plaintiff that he would prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and to prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases.

KELLY, C.B. I am of opinion that this rule should be discharged. The defendant, in my judgment, never converted these goods to his own use. The plaintiff was himself in actual possession of them, and all the defendant did was to say, "Rent is due to me, and before that rent is paid I will not allow these goods to be removed." This is no conversion. Many illustrations might be put to shew how absurd would be the consequences of so holding. For instance; suppose a lodger was ill, and an attempt were made to remove the bed he was lying on. Someone interferes, and says to the man who wants to remove, and who is the true owner, "You shall not do so." This is an interference with his dominion over his own property; yet there would be no conversion. Indeed, it it is only by relying upon the somewhat vague language which has been used about this form of action that any plausible argument can be maintained. Apart from mere dicta, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's right, would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion. In the case of *Fowler* v. *Hollins* (1)

(1) Law Rep. 7 Q. B. 616.

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the cotton was in the defendant's actual possession. I thought him not guilty because he was acting as broker merely; but even assuming the case was well decided, the plaintiff was out of possession, and the defendant had full control over the goods. So also in *Wilbraham* v. *Snow* (1), the plaintiff's tools were entirely under the control of the defendant. Nor does the case referred to by my Brother Martin, of *Fouldes* v. *Willoughby* (2) really assist the plaintiff; for the dictum of Alderson, B., which at first sight appears to favour his contention, is founded upon the assumption that the plaintiff was out of actual possession of the goods.

I think, therefore, that the plaintiff must fail in this form of action. He may have another remedy by some form of action of trespass on the case, but the measure of damages would be different. It would be unjust that, under the circumstances proved, he should recover against the defendant the value of the goods. The rule must, therefore, be discharged.

Rule discharged.

Attorney for plaintiff: *C. H. Lind.*
Attorney for defendant: *W. Day.*

Jan. 27.

MATTHEWS *v.* BAXTER.

Contracts Void and Voidable—Drunkenness—Ratification.

The contract of a man, too drunk to know what he is about, is voidable only, and not void, and therefore capable of ratification by him when he becomes sober.

DECLARATION for breach of contract in not completing the purchase of houses and land bought of the plaintiff at a sale by auction.

Plea, that at the time of making the alleged contract, the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew.

Replication, that after the defendant became sober, and able to transact business, he ratified and confirmed the contract.

Demurrer and joinder.

(1) 2 Notes to Saund. by Wms. 87. (2) 8 M. & W. 540.

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Manisty, Q.C. (*Hills*, with him), in support of the demurrer. The contract of a man, who was totally drunk and incapable at the time, is not voidable merely, but void: *Gore* v. *Gibson*. (1) It cannot therefore be ratified. *Molton* v. *Camroux* (2), which may be relied on by the plaintiff, only proves that where a lunatic's or drunkard's contract is executed, and the parties to it cannot be replaced in statu quo, such a contract cannot afterwards be set aside. In the present case the contract is executory, and the parties to it can be replaced in their original position.

Morgan Lloyd, contrà. The case of *Molton* v. *Camroux* (2), shews that a drunken man's contract is only voidable. *Gore* v. *Gibson* (1) is no authority to the contrary, for although in that case such a contract is spoken of as "void altogether," that expression must be taken with regard to the facts then under consideration. There was no suggestion there of any ratification, and the defendant was entitled to succeed upon proof that his contract was voidable, and that he afterwards avoided it. Suppose the defendant wished to enforce the contract. The plaintiff could not refuse to perform it. And if the defendant could have enforced performance, he certainly had power to confirm it.

KELLY, C.B. I am of opinion that our judgment must be for the plaintiff. It has been argued that a contract made by a person who was in the position of the defendant, is absolutely void. But it is difficult to understand this contention. For, surely, the defendant, upon coming to his senses, might have said to the plaintiff, "True, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it." And if the defendant could say this, there must be a reciprocal right in the other party. The contract cannot be voidable only as regards one party, but void as regards the other; and if the drunken man, upon coming to his senses, ratifies the contract, I think he is bound by it.

MARTIN, B. I am of the same opinion. The judges in *Gore* v. *Gibson* (1) use the word "void," it is true, but I cannot think they meant absolutely void. They simply meant to say that a drunken

(1) 13 M. & W. 623. (2) 2 Ex. 487; 4 Ex. 17; 18 L. J. (Ex.) 68, 356

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man's contract could not be enforced against his will. But it by no means follows that it is incapable of ratification. The case is an authority that this plea is good, but no authority for holding the replication bad. I think that a drunken man when he recovers his senses, might insist on the fulfilment of his bargain, and therefore that he can ratify it, so as to bind himself to a performance of it.

PIGOTT, B. I agree with the rest of the Court, although with some hesitation. The language of the judges in *Gore* v. *Gibson* (1) must be taken with regard to the subject then under consideration; and the word "void" must be taken to mean no more than that the contract could not be enforced in invitum against the defendant. Upon the whole, I think the contract was voidable only, and therefore capable of ratification.

POLLOCK, B. I am of the same opinion. The case of *Gore* v. *Gibson* (1) was, no doubt rightly decided, but some of the dicta of the judges cannot be supported in all their fulness since the decision in *Molton* v. *Camroux*. (2) I think the contract of a drunken man is voidable and not void.

Judgment for the plaintiff.

Attorneys for plaintiff: *Helder & Roberts.*
Attorneys for defendant: *Wood & Tinkler.*

(1) 13 M. & W. 623. (2) 2 Ex. 487; 4 Ex. 17; 18 L. J. (Ex.) 68, 356.

DIXON *v.* BIRCH.

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Feb. 13.

Innkeeper—Hotel Company—Holder of Licence.

The plaintiff having lost his goods at a hotel, of which a company were proprietors, sought to recover their value in an action against the paid manager, in whose name the justices' licence had been granted:—

Held, that the company were the real "innkeepers;" and, therefore, that the action was not maintainable.

THIS was an action to recover the value of certain goods of the plaintiff stolen from him at the Clifton Arms and Pier Hotel, Liverpool.

At the trial before Lush, J., at the Liverpool Winter Assizes, 1872, it was proved that the defendant was the manager of the hotel in question for the "Clifton Arms and Pier Hotel Company, Limited," at a salary of 15*l.* per annum. The licence was in her name; and her name, as well as that of the company, was painted over the front door. She managed the ordinary domestic business of the establishment. The company's name was printed on the top of the bills made out for the various customers, and all the property in the house was theirs. The plaintiff's loss amounted to 21*l.* The learned judge was of opinion that the company were the real "innkeepers," and directed a nonsuit, with leave to move to enter a verdict for the plaintiff for 21*l.* if the Court should be of opinion that the defendant was liable. A rule nisi was obtained accordingly, against which

Temple, Q.C., and *Sims*, shewed cause. The defendant was a mere servant, and the real innkeepers were the company. The only possible ground of liability is, that the licence, which the justices, under 9 Geo. 4, c. 61, must grant to some particular individual, is in the name of the defendant. But this cannot impose upon her any liability as an innkeeper. She is the nominee of the company; and, except for revenue purposes, cannot be said to keep the inn.

[They referred to Bacon's Abr. Tit. "Inn," and to the definition of "Inn" in 26 & 27 Vict. c. 41, s. 4.]

Herschell, Q.C., and *Tomlinson*, in support of the rule. The

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company keep the inn through the agency of the defendant, who, as being the holder of the licence, must be considered the real innkeeper. She would clearly be indictable herself for any offences against the tenor of the licence, although merely a paid servant. But if she be the "innkeeper" as regards one sort of liability, why is she not also the innkeeper as regards all other sorts? It may be said her liability as licensee is statutory, but there can be no difference between statutory and common law duties. She may have to account for all profits to another, but she "keeps the inn": *Brooker* v. *Wood* (1); *Milligan* v. *Webb.* (2)

MARTIN, B. I think the ruling of the learned judge was correct. The defendant was only the manager of the hotel company, who were the real innkeepers. The circumstance that the licence was taken out in her name does not, in my opinion, alter her position; and there is nothing in the licensing Acts which prevents it from being shewn that the real "innkeeper" is not the person licensed, but some one else.

PIGOTT, B. I am of the same opinion. The company kept this hotel in fact. Their name was over the door and on the bill-heads. The defendant, no doubt, for the purposes of the revenue, was in one sense the keeper of the inn; the licence was in her name. But this fact is quite beside the question of who was the real innkeeper for all other purposes.

POLLOCK, B. I also think the rule should be discharged. The case ought to be considered quite apart from the licensing Acts. Those were passed for purely fiscal purposes; they cannot alter the position of the parties, nor turn an agent or servant into a principal. In this case the defendant was the paid manager of the company, and certainly would not be liable at common law; and the licensing Acts in no way extend her liability.

Rule discharged.

Attorney for plaintiff: *Barnard.*
Attorneys for defendant: *Torr, Janeway, & Tagart.*

(1) 5 B. & Ad. 1052. (2) 12 Ad. & E. 737.

WRIGHT *v.* THE MIDLAND RAILWAY COMPANY. 1873 Jan. 30.

Negligence—Railway Company—Liability of one Company for Negligence of Another with Running Powers—Parliamentary Agreement as to Traffic.

The N. Company had statutory authority to run over a portion of the defendants' line, paying a certain toll to the defendants. The signals at the point of junction between the two lines were under the control of the defendants. Owing to the servants of the N. Company negligently disobeying these signals, a train of the N. Company ran into a train of the defendants in which the plaintiff was, causing him damage. There was no negligence on the part of any of the defendants' servants. In an action for injuries sustained, brought by the plaintiff against the defendants:—

Held, that he was not entitled to recover.

Great Western Ry. Co. v. *Blake* (7 H. & N. 987); *Thomas* v. *Rhymney Ry. Co.* (Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. 266), considered and distinguished.

DECLARATION (in the ordinary form), against the defendants for negligence in the management of a train in which the plaintiff was a passenger. Plea, Not guilty. Issue.

The cause was tried before Cleasby, B., at the Yorkshire Summer Assizes, 1872, when the following facts were proved:—

The plaintiff was a passenger on the 29th of August, 1871, by the defendants' railway from Leeds to Sheffield. About 400 yards from the defendants' station at Leeds a line belonging to the London and North Western Railway Company joins the defendants' line, over which, for a short distance, the London and North Western Company have running and other powers under the provisions of the Leeds New Railway Station Act, 1865 (28 & 29 Vict. c. cclxvii.). By that Act, after reciting that the making of a new railway station on the south-east side of the Wellington Station of the Midland Railway Company at Leeds, with lines to connect such new station with existing and proposed railways there, would be of public advantage, and that it was expedient that the North Eastern and London and North Western Railway Companies should be authorised to make the new station and the connecting lines, and that the defendants should be empowered to enter into the arrangements thereinafter specified, it was amongst other things enacted (s. 13) that the companies might make the new station and connecting lines, and that the station and lines should be part of the undertaking of those com-

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panies respectively; and (s. 39) that the companies might pass over, and use with their engines and carriages, those portions of railway belonging to the Midland Railway Company which might be necessary in order to get access to and from the several junctions from and to the intended station, paying to the Midland Company the sums provided by the agreement scheduled to the Act, and that the Midland Company should perform upon such portions of their railway and premises all such services and duties as might be necessary or reasonable for the convenient conduct of the traffic of the companies over the same. The agreement scheduled provided for the payment to the Midland Company of a mileage toll for the use of their lines.

At the junction of the lines of the Midland and North Western Companies is a signal box, under the management of a servant of the defendants. Upon the occasion of the accident for which this action was brought, the signalman had set the signal in favour of the defendants' train, and against any train approaching the junction on the North Western line. The train in which the plaintiff was proceeded, in obedience to the signals, along the portion of the line over which both companies had power to run, and whilst upon it was run into by a North Western train which was driven by persons who had negligently disregarded the signals. Injuries were sustained by the plaintiff in consequence. The jury found that the defendants had been guilty of no negligence, and that the collision was occasioned by the negligence of the servants of the London and North Western Railway Company; and a verdict was entered for the defendants, with leave to move to enter the verdict for the plaintiff for a sum contingently assessed by the jury, if the Court should be of opinion that the defendants were responsible. A rule was obtained accordingly, in Michaelmas Term, 1872.

Digby Seymour, Q.C., and *Barker*, shewed cause. The jury have found that there was no negligence in the defendants' servants, and the circumstance that under the Act (28 & 29 Vict. c. cclxvii.) the London and North Western Railway Company could run over a portion of the defendants' line cannot make them responsible for the negligence of the servants of the last-mentioned company, who

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although they use the line under a statutory arrangement, nevertheless use it as a public highway. In *Great Western Ry. Co.* v. *Blake* (1) the defendants' company ran by agreement over parts of the South Wales Railway, and were held responsible to Blake, because, having undertaken to carry him safely from one place to another, the fact of the line where the collision happened not belonging to them did not excuse them. They were bound, under their contract, to see the plaintiff safely through his journey, and their contract extended not only to lines in their exclusive possession, but also to lines over which they ran under agreement with other companies who also used them. *Thomas* v. *Rhymney Ry. Co.* (2) was decided on similar grounds. There the defendants had running powers at the place where the accident occurred, over the lines of the Taff Vale Company, and were held to have contracted that neither they nor the other company would be guilty of negligence. In the present case the accident happened on the defendants' own line through the negligence of a company with running powers over it. On principle the defendants ought not to be liable for the other company's acts, and the authorities referred to, although the judgments contain dicta favourable to the plaintiff, are not directly in point, and ought not to be extended. The defendants are, no doubt, bound to see that their line and carriages, &c., are in a fit and proper condition for carrying their passengers, but there their duty ends.

Field, Q.C., and *Forbes*, in support of the rule. The cases of *Muschamp* v. *Lancashire & Preston Ry. Co.* (3); *Great Western Ry. Co.* v. *Blake* (1); *Readhead* v. *Midland Ry. Co.* (4); and *Thomas* v. *Rhymney Ry. Co.* (2), establish the principle that a railway company contracting to carry either goods or passengers from one point to another are bound to use reasonable care themselves, and, further, to see that all other persons lawfully using their line use reasonable care. If in the present case the North Western Company had negligently left a carriage or other obstruction on the defendants' line, the defendants would have been liable if an accident had happened through one of their trains coming into collision with it;

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(2) Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. ~~266~~ 226
(3) 8 M. & W. 421.
(4) Law Rep. 2 Q. B. 412: Law Rep. 4 Q. B. 379.

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and this though they themselves had been guilty of no negligence. Where is the difference between the case of the defendants' train running into a North Western carriage, and a North Western carriage running into the defendants' train? The obligation on the defendants is to keep the line clear, and the particular mode in which it becomes dangerous is immaterial. Unless the defendants are liable, the plaintiff would have no remedy at all, for there was no contract between the North Western Company and him. It may be conceded that the defendants would not be responsible for the acts of a mere trespasser, but in the present case the act causing the damage was done by persons with a right to use the defendants' line under Act of Parliament.

[They also cited *John* v. *Bacon* (1); *Daniel* v. *Metropolitan Ry. Co.* (2).]

BRAMWELL, B. I am of opinion that this rule should be discharged.

The facts are simply these. The defendants undertook to carry the plaintiff from Leeds to Sheffield. While he was performing the journey, upon their own line, there being no negligence of any sort upon their part, either as owners of the line, or carriers, or otherwise, the train of the London and North Western Company, through the negligence of the servants of that company, ran into the defendants' train, and so injured the plaintiff. The act that did the damage was solely and exclusively the act of the North Western Company. Now why, under those circumstances, should the defendants be liable? If this had been the case of goods they would have been liable, because they are then insurers; but here the duty of the defendants, according to the decided cases, is this: they enter into a contract that all persons connected with the carrying and with the means and appliances of the carrying, with the carriages, the road, the signalling, and otherwise, shall use care and diligence, so that no accident shall happen. But they contract no farther. If they were to contract that everybody should use care and diligence, their duty would extend to strangers. But it is conceded that they have no such duty as that. They have no contract or duty that strangers to the railway (if one may use such

(1) Law Rep. 5 C. P. 437. (2) Law Rep. 5 H. L. 45.

an expression) shall do nothing wrong either by wilfulness or negligence, but it is said that they have a sort of intermediate obligation which is *more* than that all who are engaged in the carrying shall use care and diligence, but *less* than that all mankind shall use care and diligence, and not be guilty of wrong: a sort of obligation that all persons who have occasion, and who lawfully may use the line, shall not be guilty of any negligence or misconduct. Where is the authority for that proposition? In reason and upon principle how is it justified at all? It is said to be a very convenient thing that the plaintiff should be able to sue those undertaking to carry him, and should not be driven to inquire who it was that injured him, and bring his action against that person. But that is really an argument that it is very convenient to be unjust. Why there should be some duty extending beyond all those engaged in the carrying, and yet not including all mankind, I cannot see, either in reason or upon principle.

Now one word about the authorities. The first case quoted was *Great Western Ry. Co.* v. *Blake.* (1) That decision appears to me to have proceeded upon the grounds particularly expressed in the judgments of Cockburn, C.J. and Crompton, J., from which I gather that the Court considered that the defendants undertook to carry the plaintiff over the South Wales Railway, and therefore they undertook that the South Wales Railway Company's lines should be in a fit condition for the conveyance of the plaintiff. I will not say that I see nothing unreasonable in that, but I see nothing so unreasonable in it as, at all events, the proposition of the plaintiff upon the present occasion would be. This seems to me a plausible way of putting the case: "You have undertaken to take me to this place; I care not by what means you do it. You are going to take me by a certain railway belonging partly to yourselves and partly to others. On your own railway you would be bound to take due and reasonable care that it shall be in a fit and proper condition to convey me, so therefore you ought to undertake that the other railway over which you carry me shall be, and of which I know nothing at all." I say I think that is a plausible proposition, and I will not cavil at it. It is decided, and one ought not, without one is satisfied that the opinion expressed is wrong,

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

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to say that it is so. The South Wales Railway was not in fact in a fit condition for the carriage of the plaintiff, because somebody who was the servant of the South Wales Railway Company had put a carriage there, and the South Wales Company's servants had left it there. Therefore if the defendants had undertaken that the whole line should be in a fit condition, their contract had not been performed. Similar reasoning will apply to the case of *Thomas* v. *Rhymney Ry. Co.* (1), and more especially when it is remembered that in that case the departure of the defendants' train from the Taff Vale Station depended upon certain information which they could get there, which information was to be given to them for their guidance, and for want of which information the accident happened. Therefore it may well be said that there was neglect in certain persons whom the Rhymney Company employed, to give them notice whether their train should go on or not. And although the case was not one of master and servant, it may well be that the Taff Vale porter and the station officials were the agents of the Rhymney Company in such a sense as to make the defendants responsible for their misdeeds. At all events, if these persons did nothing,—which was the case when they did not tell the defendants they ought not to go on,—the defendants were in this situation that nobody had done that which ought to have been done before they started on their forward journey. It seems to me, therefore, that those two cases prove nothing more than what I have said, namely, that if in the carrying of the passenger, including therein road, engines, carriages, signalling, and so on, there shall be any negligence from which damage may accrue to the passenger, the company are liable. But here there is nothing of the sort. This act of the North Western Company is not negligence which related to the plaintiff being carried at all; it was done while he was being carried it is true, but it had nothing to do with his being carried. It was done by the North Western Company for their own purposes in a matter not connected with the carrying of the plaintiff. It was not a negligent act which made the road unsafe, nor the carriage or engine unsafe, or the signals wrong, but done outside of the carrying (if I may use the expression) and which caused damage to the plaintiff

(1) Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. 266.

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while he was being carried. It is admitted that if the London and North Western Company had been trespassers, this action would not be maintainable, but it is said that because they had a right to be there, there is some obligation on the part of the defendants with relation to them which makes the defendants liable. Now I think there is such an obligation, but only to this extent, that the defendants are bound to use due and reasonable care that the London and North Western Railway Company shall not run into them, and shall do nothing to make the road or the defendants' carriages unsafe. But the defendants did their duty in this. For they signalled to the London and North Western train not to come on, and I think if the defendants' engine driver could have seen that the London and North Western train was coming on, and could have stopped before coming into collision with it, he ought to have done so.

But the argument is not only that there is some duty with regard to the user of the line by the London and North Western Company, but also that the London and North Western Company shall not be negligent. I protest that I cannot see the reason of that. Suppose, for example, they had crossed upon a bridge of their own over the defendants' line, and by their negligence the bridge had broken down, and so damaged the Midland Company's trains; would there have been any liability? Certainly not. And what is the difference between the principle in that case and this?

Then Mr. Forbes puts this case. He says, supposing a carriage had been left by the North Western Company on the railway; that would be a nonfeasance, and there would be no liability upon the part of the defendants, because they did not put it there, and no liability upon the part of the North Western Company because there is no privity. I dissent from both propositions. If it had been left by the North Western Company upon the line it would have been the duty of the defendants to have got it out of the way, and if they had not done so they would not have had the line in the condition in which it ought to have been. The case would then have been the same as *Great Western Ry. Co.* v. *Blake* (1) because the undertaking is that the line should be in a fit condition for the passage of the plaintiff.

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

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But, further, I disagree with Mr. Forbes in his other proposition. It would be a misfeasance on the part of the North Western Company to place on the line an obstruction endangering the passage of travellers along it. Indeed it might be an indictable offence. I think, therefore, in the case put, the plaintiff would have had an action against the North Western Company, although there was no privity, and upon the authority of *Great Western Ry. Co.* v. *Blake* (1) he would have had an action against the defendants.

A striking remark was made by my Brother Cleasby that a railroad is a public highway and people may use it. I know they do not, and I know practically they cannot, and that is why running powers are obtained; but still it is a public highway upon which everybody, with properly arranged engines and so forth, has a right to go. What would happen if anybody using the line in that way had under those powers done this thing? Would any liability attach to the defendants? They are liable as carriers, and yet, looking to the illustration put by my Brother Cleasby, they would be liable simply because somebody else, having the right to use the same road, had run into them. If that is so, it would follow, that if an omnibus ran into a cab the cab proprietor would be liable for the damage done.

It seems to me, therefore, that, in the reason of the thing, this is a plain case, and I do not think that any of the authorities have created any difficulty in the way of our decision. This rule must accordingly be discharged.

CLEASBY, B. I also think that we may discharge this rule without in any way coming into conflict with any of the decided cases.

I quite agree that a contract for carriage from one place to another extends over the whole journey whether upon the line of the contracting company or not, and, further, that it is the carrier's duty to use due and reasonable care during the whole journey. And I think that due and reasonable care extends to everything that is made use of by the contracting party during the course of that journey. For instance, as regards the construction of a railway, it embraces a contract that the rails themselves shall be in a sound and efficient state, so far as due care can make them so, and if they were worn

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

out on a part of the railway not belonging to the contracting company, and which therefore they had not the power to repair, I agree that the decisions would establish that they would be liable for a want of care in those rails not being in a proper state if any damage was sustained thereby; and the same may be said if the switches or anything of that sort were defectively constructed, and it were made out that in the course of a journey over the rails an accident arose from that defective construction. So, again, as regards persons employed by the carrying company or made use of by them. The management of the stations, for example, is in the hands of certain persons; certain regulations are made; and I will suppose that whilst the regulations are proper and sufficient the persons entrusted with the duty of enforcing them, as in the *Rhymney Case*, fail to do so, and an accident occurs in consequence. In such a case the contracting company in performing their contract make use of those persons, and although the arrangements at the station may be in other hands, still the carrying company would be responsible. That seems to me consistent with reason, and certainly is consistent with the authorities that have been referred to; it is consistent with *Great Western Ry. Co.* v. *Blake* (1), where the decision is put upon the footing of there being neglect in allowing that to be upon the line which ought not to be there, and it is also consistent with *Thomas* v. *Rhymney Ry. Co.* (2). In the latter case I was a party to the judgment in the Exchequer Chamber, and acquiesced in it upon the ground referred to in that passage which occurs in the Lord Chief Baron's judgment (at p. 274) where he put the case as one of negligence in something connected with the management of the railway, the defect being in the management of the railway during the journey on which the accident took place. That is the effect of the authorities, which I will not go into any further.

Now, it appears to me that the railway ought to be in a reasonably fit state, free from obstruction so far as regards the management and care of the railway; but it is unsound to argue (as is attempted in this case) that the contract is that the railway shall b in a reasonably fit state so far as regards the acts of third par-

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.

(2) Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. 266.

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ties, whoever they may be, who, whether negligently or not, cause some obstruction. I cannot connect with the management of the railway something which is the direct effect not of defective regulations of the company, not of any act to which they were parties, not of the neglect of any person whose services they use, but of the neglect of some persons over whom they have no control whatever, and of whose services they do not make use.

It seems to me the case of a level crossing is a very good illustration. Persons have a right to cross a level crossing with a cart. The railway company contracts to carry safely along the line, and the level crossing is upon that line. But do they contract that a person shall not, contrary to their regulations, cross at the time the train is going along properly? They do contract that the line shall be in a fit and proper state, so far as it can be made so by regulation; but they do not say it shall be in a proper state if a person, contrary to their regulations, brings a cart there. That seems to me the distinction that ought to be drawn in this case. Without, therefore, in any degree, dissenting from any of the authorities cited, I think the rule should be discharged.

POLLOCK, B. I entirely agree with the other members of the court. The first thing is to find out what is the contract between the parties, and, unfortunately, the distinction between the duty of a carrier in the carriage of goods and the carriage of passengers was for many years not clearly laid down in this country. In America it had been considered, and the decisions were tolerably clear upon it. But in *Readhead* v. *Midland Ry. Co.* (1) the whole law was thoughtfully considered and carefully laid down, shewing that the contract of a railway company with a passenger is not that of an insurer, but simply to take sufficient care and to use due diligence in the providing materials, engines, carriages, and so on, for the passage of the passengers. That being so, there is no difficulty whatever in applying the rule where the railway company's line is all their own; but when you get a case where the passenger, in order to get to his destination, has to go over other lines, over which the defendants' company may have running powers, or which, by some other contract, they may have the right to use, then an

(1) Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.

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apparent difficulty arises. It is quite clear upon principle, and now upon authority, that the utmost extent to which the railway company, who are the defendants and the first contracting parties, may be made liable, is for due diligence and care and the due provision of proper materials, fixed or locomotive—that is, engines, rails, carriages, and all the necessary appliances for the carriage of the passenger upon the lines in respect of which the contract arose; and this makes it quite immaterial whether it is the case of several railway companies, or a case in which the passenger is carried by different means of locomotion. Such was one of the cases cited by Mr. Field, of *John* v. *Bacon* (1), where the accident arose at Milford Haven, by reason of the hatchway upon a hulk being out of order. Such is constantly the case. It is so, for example, in the case of a journey from London to Kingstown, which is partly by railway, partly by steamer. There can be no doubt that, in all those instances, the first contracting company would be liable. But there you must stop. If you do not stop there, it is impossible to say in respect of whose contract you would seek to make the defendants liable. Their liability would extend to the acts of all persons using the railroad.

Now, Mr. Field, feeling this difficulty, argued that this is not merely the ordinary case of a highway. He admitted that, if any person, either by an obstruction in the highway, or by running into another carriage, injured a passenger, then the carriers would not be liable; but, he said, that here there is something in the nature of an agreement between the Midland Company and the other company, whereby the Midland Company gets the benefit of the other company's using their line. Upon that part of the case I think Mr. Barker put the sections of the Act of Parliament clearly before us, and shewed that the railway was still a highway, and that this was merely a particular arrangement as to this particular highway; just as in London and other large towns a portion of the highway is attributed to tramways, while the rest of the public are left to their common law rights upon the rest of the road.

But I am not prepared to say, that if Mr. Field's argument were right there would be any liability. Take the case of a man who let out a field to a number of persons, and that a number of

(1) Law Rep. 5 C. P. 437.

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the lessees came and exercised their horses in that field, their common property. Each man coming into that field contributes money to the man who is the owner, but he does not become the agent of the owner in such a manner as to make the owner responsible for all his actions. And if one were riding his horse properly and carefully in that field, and another person came in with a horse which was vicious and troublesome, and known by the rider to be so, and partly by that, and partly by the carelessness of the rider, an injury was occasioned to another person; in that case the owner of the field, though he got the benefit of the letting, would not be responsible for the act by which the person got the injury, unless he had knowledge upon the subject. I do not think that the Midland Company can be made liable, except by shewing either that the act was occasioned by some misfeasance or negligence on the part of themselves or their servants, or was occasioned by the act or misfeasance of some other people in such a manner that the Midland Company had a knowledge of it and could have remedied it. That is not the case here, and therefore I think they are not liable.

Rule discharged.

Attorneys for plaintiff: *Doyle & Edwards.*

Attorneys for defendants: *Hayes, Twisden, & Parker, for Burbeary & Smith, Sheffield.*

MACKERETH *v.* THE GLASGOW AND SOUTH WESTERN RAILWAY COMPANY. 1873 *Jan.* 23.

Foreign Corporation—Service of Writ—Service on Officer in England—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 16.

The defendants were a Scotch corporation, with running powers over an English railway to Carlisle, and their only officer in England was a booking clerk at a station at Carlisle, whose sole duty was to issue tickets to travellers. The station at Carlisle was wholly under the control of the English company, but the defendants had use of it at a rental payable to that company. The defendants' head office was in Scotland:—

Held, that the booking clerk was not a head officer or clerk of the defendants, who could be properly served with a writ issued against the defendants.

Newby v. Von Oppen (Law Rep. 7 Q. B. 293) distinguished.

RULE calling on the plaintiff to shew cause why the writ of summons in this action and the service thereof should not be set aside.

The writ was issued and served on the defendants under the following circumstances:

The defendants are a Scotch railway company, and have no part of their railway in England. They have, however, running powers in perpetuity by agreement with the Caledonian Railway Company over the part of the Caledonian Railway which lies between Gretna and the Citadel Station at Carlisle. The defendants have the use of that station at a rental payable to the Caledonian and London and North Western Railway Companies, who are joint owners of the station. The defendants have a booking clerk there. The writ in this action (which was for injuries caused by a collision between a train belonging to the defendants and a train belonging to the Caledonian Railway Company) was served on the booking clerk at Carlisle, and was forwarded by him to the defendants' secretary at Glasgow. The defendants' principal or head office is at Glasgow. The directors hold their meetings there, and the secretary and general manager both reside there, and it is there that the affairs of the defendants' railway are conducted. Except the booking clerk at Carlisle, the defendants have no officer in England, and he has no power or authority whatever at the station beyond the power of issuing tickets to passengers by the defendants' trains.

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Herschell, Q.C., shewed cause. The service was a good service according to the principles laid down in *Newby* v. *Von Oppen* (1), where it was decided that service of a writ on the head officer of an English branch of a foreign corporation carrying on business in England is good. In that case Blackburn, J. (at p. 296), says, a company must be treated as "resident" wherever they carry on trade. Here the defendants do carry on business in England, and the booking clerk at Carlisle is their only officer in England. The 15 & 16 Vict. c. 76, s. 16, which is declaratory of the common law, enacts that a corporation may be served by serving their head officer or clerk, and the booking clerk at Carlisle being their only officer must be deemed the head officer and the right person to serve. The company carry on business at Carlisle, and the section therefore applies to them, although a foreign corporation with no office in England would not be included in its terms: *Ingate* v. *Austrian Lloyd's Co.* (2) [He also referred to *Wilson* v. *Caledonian Ry. Co.* (3)]

Wills, Q.C., and *Carter*, in support of the rule. If the plaintiff is right, although the contract be made and the breach occurs out of the jurisdiction, the defendants can be sued here. If the defendants, instead of being a corporation, were individually liable, they could not be sued, for by s. 18 of the Common Law Procedure Act, 1852, although a writ can be served on a British subject abroad, it cannot be served on a British subject in Scotland or Ireland.

[BRAMWELL, B. Scotland and Ireland were advisedly excluded, and not as has been supposed per incuriam.]

Why then should a different rule be applied to a corporation? The real question is, whether the defendants can be said in any sense to reside at Carlisle. If they were an English company with a head office elsewhere, it is clear that the service here would be bad; and it seems absurd to hold that because their head office is in Scotland service on the Carlisle clerk is good. The decisions under the County Court Acts as to the meaning of the words "carry on business" are all unfavourable to the plaintiff: see *Shiels* v. *Great Northern Ry. Co.* (4); *Garton* v. *Great Western Ry.*

(1) Law Rep. 7 Q. B. 293.
(2) 4 C. B. (N.S.) 704; 27 L. J. (C. P.) 323.
(3) 5 Ex. 822; 20 L. J. (Ex.) 6.
(4) 30 L. J. (Q. B.) 331.

Co. (1) *Wilson* v. *Caledonian Ry. Co.* (2) is distinguishable. There the defendants were partly an English company. Here the defendants are purely a Scotch corporation without property in England, and cannot be sued in England: *Carron Iron Co.* v. *McLaren.* (3)

Newby v. *Von Oppen* (4) does not govern this case. There the defendants had a regular branch establishment in London, and one of the main purposes of their existence was the sale of arms there.

BRAMWELL, B. I think this rule should be made absolute. The service of this writ, if it is not good under the Common Law Procedure Act, 1852, is not good at common law. We may, therefore, consider the question as arising under the statute. Now s. 16 enacts that a writ of summons issued against a corporation aggregate, may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. But "clerk" here does not mean any clerk, but a principal clerk, like a town clerk in the case of a municipal corporation or the secretary of a public company. The case of *Walton* v. *Universal Salvage Company* (5) (decided under 2 Wm. 4, c. 39, s. 18), is an authority for this interpretation of the words. Is the service then on this clerk at Carlisle, good? I think not. One has only to describe his duties to see that he is not a head officer of the defendants. The words of the section, therefore, are decisive against the plaintiff. It is argued, however, that wherever a railway company carry on any part of their business, there they must be taken to reside and to have a head officer. I cannot assent to this as a general proposition, although, no doubt, in some cases, as in *Newby* v. *Von Oppen* (4), it may be true. If the defendants had been individuals and not a corporation, it would certainly have been an evasion of the Common Law Procedure Act, 1852, s. 18 (which excludes British subjects residing in Scotland), to have effected service by the means employed here. But if the service could not have been effected on an individual, I can see no reason why a corporation should be in a different position. Why should the statute leave

(1) 1 E. & E. 258; 28 L. J. (Q. B.) 103.
(2) 5 Ex. 822; 20 L. J. (Ex.) 6.
(3) 5 H. L. 416, at p. 458.
(4) Law Rep. 7 Q. B. 293.
(5) 16 M. & W. 438.

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Scotch men out and Scotch corporations in? I can see no reason. The argument ab inconvenienti was pressed upon us; but it tells against the plaintiff; because if he is right the action would be maintainable though the contract and its breach both happened in Scotland. A purely Scotch cause would then be triable in London.

Again, it was virtually conceded that if the defendants were an English company, this clerk would not be a proper person to serve. In other words, we are asked to hold that he is a head officer not because of his duties, but because his master happens to live in Scotland. That seems a strange consequence. Moreover, as Mr. Carter pointed out, this plaintiff could not have sued the defendants, if they had been an English company, in the Carlisle County Court without special leave, because they could not be held to reside there. I must add, that the case of *Newby* v. *Von Oppen* (1), is very different from this one. Here the clerk's employment is of a very limited character. In a sense he is capable of making contracts for the defendants. But in the case in the Queen's Bench the main object of the defendants was to sell the goods they manufactured, and they were rightly held to reside at the place in England where they offered their goods for sale. In making this rule absolute, therefore, I do not feel it necessary to dissent from this authority, although I am not prepared to agree with the abstract proposition there laid down in the judgment by Blackburn, J., at all events without further consideration.

CLEASBY, B. I am of the same opinion. The service of a writ must be on the "head officer" of a corporation, and in the case of an English corporation there is not much difficulty, although, no doubt, there might be two head offices in different towns. Here the head office, using the word in its ordinary sense, is abroad, but the defendants conduct business in England. Now, in cases where a defendant has a regular branch establishment here, service on the manager there might suffice. Each case must depend upon the sort of business carried on in England. It is easy to conceive of cases where a corporation might be a foreign one nominally and

(1) Law Rep. 7 Q. B. 293.

yet its business chiefly transacted at an English establishment. But here the defendants really are a Scotch company, and their only officer in England is a mere clerk who issues tickets; one who is entrusted with a subordinate part of work, and who shares with numerous other servants of the company this limited duty. Such a man is not in any sense a "head officer." Moreover the agreement which has been referred to shews that he was under the control of the English company. In fact he is simply a subordinate of the defendants, with a licence from the English company to issue tickets in a part of their booking office.

In coming to this decision, I do not at all wish to be considered as dissenting from *Newby* v. *Von Oppen*. (1) There the facts were different and the decision therefore arrived at was different.

POLLOCK, B. I am of the same opinion. I felt at first pressed with the authority of *Newby* v. *Von Oppen* (1), but upon consideration, I think it clearly distinguishable. There the very existence of the company as a trading corporation made it essential to have a place of business, with a manager, in England. In the present case, looking at the character of the company and the duty of the agent, it may be said to be a mere accident that they employed a booking clerk of their own at Carlisle. The defendants are not an English corporation although they have running powers over a line in England. If they had been English, then, as my Brother Bramwell pointed out, there could have been no doubt. It cannot make a difference that their head office is in Scotland. But I do not at all wish to be thought to dissent from the decision in *Newby* v. *Von Oppen*. (1) If, however, the abstract proposition there laid down be correct, service at any place between Gretna and Carlisle, even on a mere porter, would be enough. For the defendants carry on their business all along the line. The view I take receives some confirmation from the county court cases more particularly referred to by Mr. Carter. Upon the whole, therefore, I agree that the rule should be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Phelps & Sidgwick.*
Attorneys for defendants: *Beale, Marigold, & Beale.*

(1) Law Rep. 7 Q. B. 293.

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Feb. 19.

[IN THE EXCHEQUER CHAMBER.]

THE COMPANY OF AFRICAN MERCHANTS, LIMITED, *v.* THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED.

Insurance—Usage of African Trade—Policy on Ship during "Stay and Trade" —Mixed Policy.

18 L. D. 142-4

The plaintiffs effected a policy of insurance with the defendants upon a ship at and from Liverpool to the west or south-west coast of Africa, "during her stay and trade there," and back to a port of call in the United Kingdom, at 8*l.* 8*s.* per cent., returning a per centage varying with the period of the risk, the ship being held covered at 13*s.* 4*d.* per cent. per month if more than twelve months out.

The ship proceeded to the African coast, and, after being loaded for the return voyage, remained at a port there for some weeks for a purpose in no way connected with trade. She was subsequently lost on the voyage home.

At the trial of an action on the policy, the judge ruled that, as the delay had not been for a trade purpose, there had been a deviation, and directed a verdict for the defendants. On the argument of a bill of exceptions tendered to this ruling:—

Held, a proper direction.

Bill of exceptions. The declaration was on a policy of insurance effected by the plaintiffs with the defendants on the 19th of July, 1869, upon the ship *William Dent*, at the rate of 8*l.* 8*s.* per cent. at and from Liverpool to the West or South-west Coast of Africa, "during her stay and trade there," and back to a port of call or discharge in the United Kingdom; returning 20, 40, or 60 per cent. according as the risk should end, in ten, eight, or six months, the ship being held covered at 13*s.* 4*d.* per cent. per month if longer than twelve months out.

Plea (among others) of deviation. Issue.

The cause was tried at the Guildhall Sittings after Michaelmas Term, 1872, before Kelly, C.B., when the following facts were proved:—

The plaintiffs' ship, *William Dent*, sailed in July, 1869, from Liverpool to the coast of Africa with a general cargo. She arrived at Kinsembo, on that coast, in September, and discharged her outward cargo. At the same port she took in a cargo of nuts, copper ore, ivory, &c., and on the 8th of November left the port. Her cargo was not then a full cargo, and she proceeded to other

places on the coast, taking in more cargo at each place. On the 21st of November she arrived at Cabenda, which is an open roadstead on the south-west coast, and at times exposed to heavy seas. The roadstead, however, is, as compared with others on the coast, a good one.

The ship was anchored as near the shore as she could safely get, and discharged a part of her cargo into lighters. She then proceeded to take in more cargo, and on the 24th of November, 1869, was completely loaded. The hatches were battened down, and the ship was then ready to sail on her homeward voyage. On the 25th of November a vessel, called the *Robert Jones*, struck on rocks near the entrance of the roadstead. She was got off, but afterwards sank two or three cables length from the *William Dent*. Her cargo was purchased by the plaintiffs, and the *William Dent* was detained in order to allow of her captain and crew being employed in saving the cargo of the *Robert Jones*, and for no other purpose. On the 26th of December the *William Dent* sailed for Liverpool. She had been injured in the interval by a heavy tornado, but had been repaired, and at the time of her departure was perfectly seaworthy. Upon her homeward voyage she was lost.

The learned judge was of opinion that the plea of deviation was proved, and directed a verdict for the defendants. The plaintiffs tendered a bill of exceptions, which came on for argument.

Feb. 18, 19. *Cohen*, for the plaintiffs. If this policy had been an ordinary voyage policy, the plea of deviation would have been proved, for in such a case delay is deviation. But this is a mixed policy at and from Liverpool to Africa during the ship's staying and trading there; and the premium is to vary with the deviation of the risk. The parties, therefore, contemplated the ship's remaining an indefinite time on the coast.

[COCKBURN, C.J. The policy is to cover the ship whilst she is staying and trading. Can you contend that her stay to help in saving the cargo of another ship, which her owners had bought, is a stay for a trade purpose?]

The purpose was not strictly a trade purpose, but as the policy

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contemplated a risk of uncertain duration, it must be taken that there was a discretion to stay, and, unless the risk was increased, the delay does not constitute a deviation, although the stay may not have been for a trade purpose. The policy gives liberty to stay. But the ship need not trade whilst staying.

Milward, Q.C., for the defendants. The delay was a deviation. The stay contemplated by the policy is for trade purposes only, and the purpose for which this ship was detained was in no sense a trade purpose, either in the ordinary sense or according to the usage of the African coasting business. The risk was therefore varied, and mere variation is enough. The risk need not be increased. If it ceases to be the same as that which the underwriter insured, his liability ceases.

Cohen, in reply.

[The following authorities were referred to on the argument: Phillips on Insurance, s. 983; Arnould on Insurance, 3rd ed. vol. 1, p. 361; 4th ed., by Maclachlan, vol. 1, pp. 446, 447, 449; *Harrison* v. *Ellis* (1); *Hartley* v. *Buggin*. (2)]

COCKBURN, C.J. I am of opinion that the ruling of the Lord Chief Baron was right. I agree that this policy is not a voyage policy nor a time policy simpliciter. It is a combination of the two; being a policy on a voyage to the West Coast of Africa, but at the same time in one sense a time policy, because the assured is entitled under it to keep the ship insured on that coast for any period subject to certain conditions. But, whatever the policy be called, the purpose of the voyage is distinctly stated. It is that the ship is to "stay and trade" on the African coast. Mr. Cohen has ingeniously argued that these words mean "stay and something more;" in other words, that the liberty to trade is an enlargement of the permission to stay. If this were so, however, the word "stay" would itself have been sufficient, and the words "and trade" would have been superfluous. I cannot assent to this construction of the policy. I think the language used means that the vessel may stay for a trading purpose, but for no other; that is, for any purpose which having regard to the usage of the African trade, may fairly be regarded as a "trade purpose." For example, sup-

(1) 7 E. & B. 465; 26 L. J. (Q.B.) 239. (2) 3 Dougl. 39.

pose after the cargo was loaded it became doubtful whether the destination originally fixed for it by the owner should be adhered to or whether that destination might not be changed with advantage, a delay whilst the port of discharge was being fixed would be a delay for a trade purpose. So again, if the vessel was used for a purpose foreign at first sight to trade, but still sanctioned by usage, as happened in the case cited from Douglas (*Hartley* v. *Buggin* (1)), the delay would not be a deviation. It would be a question of fact for a jury whether the purpose was or was not a trade purpose. But in the present case no attempt was made to shew that a delay in order to save a wreck belonging to the same owners was, by the usage of the African trade, in any sense a trade purpose; and we must assume, therefore, that the delay was not for the purpose of trade at all, but foreign to it. This being so, the risk undertaken by the underwriter was varied, and he is therefore discharged.

BLACKBURN, J. I am of the same opinion. The principle which governs the case is thus stated in Phillips on Insurance, s. 983: "It is not necessary to a deviation or change of risk whereby the underwriters are discharged that the degree or period of the risk should be thereby increased. The assured has no right to substitute a different risk."

The underwriter insures a particular risk, and the assured has no right to change it. Whether he increases or diminishes it is immaterial; if he varies it the underwriter is discharged. Now what was the risk which in this case the underwriter insured against? The policy is upon the *William Dent*, at and from Liverpool to the coast of Africa, during her stay and trade there, at a premium varying with the duration of the risk. Therefore the parties knew and contemplated that the stay of the vessel might be more or less protracted. But the risk covered was a staying and trading. It is true that in the African coast trade many things might by usage be considered as "trading" which would not be so considered elsewhere. For example, the employment of the ship as a tender or as a floating warehouse might be within the term. If, therefore, this vessel had been used for some purpose recognised in the coasting trade as a "trade purpose," I by no means wish to be

(1) 3 Dougl. 39.

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understood to say that there would then have been a deviation, although such a use of her would not come within the ordinary meaning of the word "trade." But where there is a real change of risk by the employment or detention of the ship for some purpose wholly foreign, the underwriter has a right to say, "I never undertook this risk. Non haec in foedera veni." This proposition is entirely borne out by the case of *Hartley* v. *Buggin* (1), where Lord Mansfield, C.J., says: "It is not material to constitute a deviation that the risk should be increased." In that case the ship insured had been used as a floating warehouse or factory ship, and the question was, whether such a use of her was by usage consistent with the object of the voyage. The policy was on the ship at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves, and the case was sent to a new trial to ascertain what the usage was. Upon that trial evidence of custom having been given on the one side and the other, Eyre, C.B., left it to the jury to say whether the use of the ship as a factory had the voyage for its object, and the jury found a verdict, which was not questioned afterwards, for the defendant. Now here, if there had been any evidence that by the usage of the coast, a delay to save a wreck was a delay for a "trade" purpose, the proper question would have been, "Do you think that the stay was for the purpose of trade?" But no evidence whatever was offered that a delay to salve a wreck belonging to the owner was either by usage or otherwise a trade purpose. Therefore we do not need to avail ourselves of the doctrine in *Ryder* v. *Wombwell* (2) that a mere scintilla of evidence need not be left to the jury, for here there was not even a scintilla. I think, therefore, that a variation of the risk was clearly proved, and that the Lord Chief Baron's ruling was right.

KEATING and MELLOR, JJ., concurred.

GROVE, J. I have had some doubt during the argument, not upon the principle of law to be applied, but upon the true construction of this policy. Mr. Cohen's contention was that the policy contemplated a stay for any purpose, trading or otherwise, and that therefore a mere delay without increased risk did not constitute a varia-

(1) 3 Dougl. 39. (2) Law Rep. 4 Ex. 32.

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tion of risk. There was a licence for an increased premium to "stay;" and the licence to trade whilst staying did not, he argued, contract the previous word. In short, he read the words "stay and trade" disjunctively, and I was at first disposed to concur in this construction. But I am now satisfied that the words must be construed as the rest of the Court construe them. They mean "stay for trading;" and here the ship stopped not to trade but to help to salve a wreck. Her delay was, therefore, what may be called capricious. The risk was varied in a manner not contemplated by the underwriter and the policy ceased to bind him.

HONYMAN, J., concurred.

Judgment for the defendants.

Attorneys for plaintiffs: *Walker & Sons.*
Attorneys for defendants: *Argles & Rawlins.*

END OF HILARY TERM, 1873.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXVI VICTORIA.

1873
April 16.

ALLGOOD AND OTHERS *v.* BLAKE.
ROACH *v.* BLAKE.
REED *v.* BLAKE.

Will—General Intent—Estate to be enjoyed by one Person—"All and every other the Issue of my Body"—"Other the Issue"—Words of Exclusion or Completion—"For Default of such Issue."

A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F. successively in tail male; and for default of such issue to R., the second son of his son, for life, with remainder to the first and other sons of R. successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born, successively in tail male; and for default of such issue to his daughter I. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter I., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth and fifth, and other daughter or daughters of his son successively, and in remainder one after another, and to the heirs male of their bodies; and for default of such issue, "to the use and behoof of all and every other the issue of my body," and for default of such issue to his right heirs. The will also contained a wish that the estates should be retained in the hands of

one person and should not be dispersed, and a provision that any female who inherited, should, with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:—

Held (affirming the judgment of the Court below), that there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general, to which his son then became entitled.

This remainder descended to F. who duly executed a disentailing deed. He devised the estates to the defendant's father, from whom it descended to the defendant. In actions of ejectment (a) by persons claiming as issue of the body of the testator as joint tenants per capita, at the time the estates vested in possession, (b) by the heiress in tail general of the testator at the same period, and (c) by the heir in tail of the testator at his death, those being excluded who came within the particular limitations:—

Held (affirming the judgment of the Court below), that the defendant was entitled to judgment.

ERROR from the decision of the Court of Exchequer upon special cases stated, in four actions of ejectment.

The facts are fully set forth in the judgment of the Court below. (1)

The cases were argued for the plaintiffs, on Feb. 15, 17, and 18, by the following counsel:

In the first action by *Manisty, Q.C.* (*Waley* and *G. Bruce* with him).

In the second action, by *Sir G. Jessel, S.G.* (*W. H. Bagshaw* and *Wallis* with him).

In the third action, by *Bristowe, Q.C.* (*Day, Q.C.*, with him).

For the defendant, in these three actions, *Charles Hall* (*Sir J. B. Karslake, Q.C.*, and *Kemplay, Q.C.*, with him), appeared, but, except in the second action, was not called on to argue.

There was also a fourth action [*Allgood and Others* v. *F. Blake*] by the plaintiffs in the first action, in respect of other property against another defendant, who also claimed under the will of the third baronet, and whose interest was therefore identical with that of the defendant in the other actions. For him, *Joshua Williams, Q.C.* (*Trevelyan* and *G. Browne* with him), appeared, but was not called on to argue.

The course and nature of the arguments sufficiently appear from the judgment.

The following authorities in addition to those cited in the Court

(1) Law Rep. 7 Ex. 339 at pp. 346—349.

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below (1) (most of which were again referred to), were relied on: *Baker* v. *Tucker* (2); *Martin* v. *Strachan* (3); *Doe* d. *Pilkington* v. *Spratt* (4); *Wrightson* v. *Macaulay* (5); *Vanderplank* v. *King*. (6)

At the close of the arguments the Court affirmed the judgments of the Court of Exchequer in the first, third, and fourth actions, reserving their judgment in *Roach* v. *Blake* and their reasons for affirming the judgments in the other actions.

Cur. adv. vult.

April 16. The judgment of the Court (Blackburn, Keating, Mellor, Grove, and Honyman, JJ.) was delivered by

BLACKBURN, J. The questions raised in these four actions all depend upon the construction of the same clause in the will of Sir Francis Blake, who died on the 29th of March, 1780, having made the will in question on the 8th of January, 1780. The provisions and effects of the will are sufficiently stated in the judgment of the Court below, printed in Law Rep. 7 Ex. from the middle of p. 346 to the middle of p. 349; and to that report we refer instead of repeating them again.

The whole question in each of the causes depends upon the true construction of what has been called the penultimate clause in the will.

The general rule is that, in construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. As is said in Wigram on Extrinsic Evidence, p. 9: "The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words." But we think that the meaning of words varies according to the circumstances of and concerning which they are used.

(1) Law Rep. 7 Ex. at pp. 344, 345.
(2) 3 H. L. C. 106.
(3) 5 T. R. 107 (n).
(4) 5 B. & Ad. 731.
(5) 14 M. & W. 214.
(6) 3 Hare, 1.

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In *Doe* d. *Hiscocks* v. *Hiscocks* (1), in the judgment of the Court of Exchequer, it is said: "The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names and describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. All the facts and circumstances, therefore, respecting persons or property to which the will relates are undoubtedly legitimate and often necessary evidence to enable us to understand the meaning and application of his words."

No doubt in many cases the testator has for the moment forgotten or overlooked material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has, by blunder, expressed what he did not mean. And the general rule, we believe, is undisputed, that, in trying to get at the intention of the testator, we are to take the whole of the will, construe it altogether, and give the words their natural meaning (or, if they have acquired a technical sense, their technical meaning), unless, when applied to the subject matter which the testator presumably had in his mind, they produce an inconsistency with other parts of the will, or an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification, and to justify the Court in putting on them some other signification which, though less proper, is one which the Court thinks the words will bear.

The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great

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(1) 5 M. & W. at p. 369.

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as to justify the Court in putting on them another signification, which to that mind seems a not improper signification of the words, whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction.

Grey v. *Pearson* (1) is an example of this. Lord Cranworth, Lord St. Leonards, and Lord Wensleydale laid down the general rules in terms not substantially differing from each other; but when they came to apply them to the case in hand, there was a marked difference of opinion. We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand; not deviating from the literal sense of the words without sufficient reason, or more than is justified; yet not adhering slavishly to them, when to do so would obviously defeat the intention which may be collected from the whole will.

Let us, then, in the first place, see what were the material circumstances known to the testator in the present case.

The state of the testator's family at the time he made his will was as follows: He had one son alive,—Francis, afterwards the second baronet, who was married, and had then living two sons, —Francis, afterwards third baronet, Robert, and three daughters, —Elizabeth, Isabella, and Sarah. These were all young children at the time of their grandfather's will.

The testator also had a daughter Isabella then alive and unmarried. He had also either four or five grandchildren, the issue of a deceased daughter, Sarah, who had married a Mr. Reed, the eldest of whom was a son, John Reed, then in his twenty-first year. The statement in the case leaves it doubtful whether a fifth grandchild, Isabella Reed, survived the testator or not.

Having made the earlier provisions in his will, the testator, if he recollected all these facts, and understood the effect of his previous limitations, would have known that he had then in existence at least four grandchildren, the issue of his deceased daughter Sarah, to whom nothing would come under the previous limitations in his will. He would also have known that it was very likely that the

(1) 6 H. L. C. 61.

children of his son Francis might have daughters who might have descendants, and that the different tenants in tail male to whom he had limited estates, and his daughter Isabella, might have daughters who might have descendants, and that the four children of his daughter Sarah might have descendants. He therefore knew that there were four persons, issue of his body, in existence, and a fair probability of a large number of persons, issue of his body, coming into existence who would take nothing under the previous limitations in his will. He also knew, or ought to have known, that when all the estates in tail male which he had created had died out there was at least a probability that his estate, if not otherwise disposed of, would descend to co-heiresses, and he has in his will declared that it was his desire "to prevent as far as may be, the dispersion of my estates amongst several persons."

Such being the state of things, he devises his estates, in default of such issue (that is issue who would take under the several estates in tail male already created) "to the use and behoof of all and every other the issue of my body, and for default of such issue to my right heirs for ever." And the question the Court has to answer, we apprehend, is what intention do these words express when used by a testator with reference to such a state of the family, and in a will containing such previous limitations and such a declaration of the testator's desire to prevent the dispersion of his estates amongst several persons.

The Court of Exchequer came to the conclusion that the intention expressed by the testator was that his estates, as an entirety, were to go to all the issue of his body successively, according to their order, and that the only means of effecting that intention was to apply the doctrine of *Mandeville's Case,* Co. Litt. 26 b, and construe the will as creating what has been sometimes called a quasi entail as if the estate had been conveyed to the testator himself and the heirs of his body.

If this be correct, there was a vested remainder in tail general created, which descended on Sir Francis Blake, the third baronet. And as he has executed a disentailing deed and all the previous estates have expired, his devisees, who are the defendants, have the title, and all the plaintiffs fail. The plaintiffs in the cases now before us dispute the propriety of this decision.

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The two actions of *Allgood* v. *Blake* and *Allgood* v. *F. Blake* are brought to recover different portions of the property from different defendants, but are in truth one.

Mr. Manisty, who appeared for the plaintiffs in those two actions, contended that the effect of the penultimate clause was to create a devise to a class, namely, to all the issue of the testator's body who should be in existence at the time when the last estate in tail male should expire from the dying out of all the issue who took under the previous limitations.

He argued that this devise vested the remainder in the four children of Sarah who were living at the testator's death, and that the class would open to receive each fresh person born afterwards who was the issue of the testator's body, not being one of those who might take under the previous limitations in the will. As the devise is of the "estates" of the testator, these parties (if this construction is to prevail) would have taken the remainder in fee among them as joint tenants, had it not been for the devise over in default of such issue to the testator's right heirs. This made it necessary to contend that they took separate undivided portions in the estates each as tenants in tail general.

In the events which have happened the result would be that on the death of Mrs. Stag, the last tenant in tail under the previous limitations, the estates were to go to forty-eight different persons as tenants in tail general of undivided parts in the whole; and, also, that several of those being children of living parents, took estates tail in parts at the same time that their parents took estates tail in other parts.

It is obvious that no testator was likely to wish to produce this result, and it is quite certain that this testator who, in the same will, declares his desire "to prevent as far as may be the dispersion of my estates amongst several persons," did not wish to do so; and Mr. Manisty did not dispute this, and he admitted that it produced a very natural prejudice against his clients, which he said was only a prejudice, for the testator had used words (according to his argument) expressing an intention to make this devise, and, in effect, he argued that the Court below, instead of interpreting his will, had made a will for him. We think that the utmost he succeeded in shewing, was that a devise to the "use

and behoof of all and every other the issue of my body" may from the context, or otherwise, be construed to mean a devise to such persons as answer that description as a class. But we think that the word "issue" is at least quite as naturally used in the sense of heirs of the body as a word of limitation, and, consequently, that the decision of the Court below in those two cases was right. We therefore did not think it necessary to hear the counsel for the defendants in these two cases, but gave judgment in them affirming the judgment below.

The plaintiff in the action of *Reed* v. *Blake* is the heir male of the body of John Reed, the eldest son of Sarah, the daughter of the testator, who died in his lifetime. Mrs. Roach, who is the plaintiff in the remaining action, is the only daughter of Mrs. Stag, the last tenant in tail male under the previous limitations of the will, and is also the heir of the body of the testator. These two plaintiffs agreed with the defendants in contending that the estates went under the penultimate devise as an entirety to some one who would take an estate tail in remainder after the estate in tail male of Mrs. Stag; they agreed with each other in contending that the effect of the word "other" was to prevent this remainder from coming to Sir Francis, the third baronet; but they differed from each other as to who it was who took that estate tail.

Mr. Bristowe, who argued for Mr. Reed, contended not only that the word "other" did not include the issue who took under the previous limitations, and who, by the supposition of the will, had failed before the penultimate limitation came into effect, but also that it did not include Mrs. Roach, who certainly was one of the issue of the body of the testator who took no estate under the previous limitations, and who has in no sense of the word failed, but is now alive. We thought this not a tenable proposition, and as in our opinion Mrs. Roach's title, whether preferable to the defendants' or not, was preferable to Mr. Reed's, we did not call upon the counsel for the defendants to argue in this case, but affirmed the decision of the Court below.

We felt more difficulty in the case of *Roach* v. *Blake*, which we heard argued fully and very ably by the Solicitor-General for the plaintiff and Mr. C. Hall for the defendant; but after taking

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time to consider, we are all of opinion that in this case also the decision of the Court below was right, and ought to be affirmed.

The words "other the issue of my body," used as they are immediately after speaking of the failure of particular issue, do, in their primâ facie natural sense, mean issue different from those who have been spoken of before. It is, we think, not so accurate to say that the word "other" excludes those mentioned before as to say that it does not include them. The Solicitor-General argued that the word had more force of exclusion, and Mr. Hall did not admit that it had so much.

But the testator has been here speaking of the event of the failure of the issue to whom he had previously limited estates, when the estate which he created by the penultimate limitation would vest in possession. And if he had in contemplation that time only, the issue of his body, who had by supposition died out, and all and every other the issue of his body, would together constitute the whole of the issue of his body. It is a very common thing to read words creating an estate in remainder, which are such as primâ facie refer to the expiration of the previous estate (and so would create an estate contingent till that event happened), as creating a vested estate in remainder from the time of the testator's death: cases to that effect will be found collected in 1 Jarman on Wills, 3rd ed. p. 764. They are all cases in which some violence is done to the words used because of the great convenience of making the estates vested instead of contingent, and of the probability that the construction really effectuates the intention of the testator, and we think that in this case the intention of the testator clearly is that every one of the other issue should take, and if it is necessary in order to effectuate that intention, we think the Court are fully justified in construing the word "other" as being used with reference to the time of vesting in possession, and as a word not intended to be operative but rather intended to be demonstrative; not intended to produce any effect, but to make the idea in the mind of the testator clearer, an intention which no doubt it fulfils very ill.

The Solicitor-General, with considerable reason, said that a decision as to the construction of one will can rarely be a guide as to the construction of another not in the same words, but it seems

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to us that the counsel for the defendants are justified in their contention that the words of this devise are so similar to those used in the will set out in the special verdict in *Burchett* v. *Durdant* (1) that the decision of the House of Lords in that case that those words created an estate tail (the reasons for which are unfortunately not reported) must have proceeded on some principle applicable to the present case.

But the main argument of the Solicitor-General was that it was in no way necessary to put any violence on the words, for that full effect could be given to the intention of the testator to give an estate to each and every of the other issue without construing the words as creating a vested estate tail general which would descend to and vest in Sir Francis, the third baronet, as heir of the body of the testator.

Two ways in which this might be done were suggested. The first was by construing them as intended to create an estate in the testator and the heirs of his body, exclusive of those heirs of his body who would take any estate under the previous limitations in the will. So that if Sir Francis, the third baronet, had had a son and a daughter, the estate tail which would have been suspended till the birth of that daughter would have vested in her, subject to an estate tail vesting in any daughter of the son who might thereafter be born and who would come in before her, which again would be subject to be divested on the birth of a niece, the daughter of her brother, if she had one, and so on as long as any male issue of Sir Francis the third existed. This the Solicitor-General called an estate in special tail, but no such estate ever has been known up to the present time. We do not think any such estate could be created; and we think it impossible to suppose that the testator intended to create such an estate.

The other mode was what my Brother Bramwell, in his judgment below, states was what he thinks the testator probably wished to say, though he thinks he did not say it. It was said we ought to construe this word "other" as meaning that an estate in tail general should be given to the daughters of the sons of his eldest grandson, or those who were the heirs of their bodies at the time when the estates in tail male expired, being contingent as to

(1) 2 Vent. 311.

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the person who was to take till that event happened. And inasmuch as in the event of there being more than one such daughter, the estate would be divided amongst them as co-heiresses, contrary to the testator's express desire to prevent the dispersion of his estates among several persons, it was suggested that such daughters were to take in succession, and on failure of their issue, a new set of contingent limitations were to be implied, which in the events that have happened would have been forty-eight in number, and might have been many more. Perhaps if the testator had given instructions to an able conveyancer, such as framed the earlier part of this will, to prepare a settlement for him to the effect which my Brother Bramwell suggests, that conveyancer might have been able to frame limitations which would have effectuated his intentions. It would not have been easy, and the limitations would, when expressed, have probably been very voluminous, but it might perhaps have been done.'

But we think when we are asked to crowd into one word "other," the whole of such a complicated limitation we are asked to put a far greater strain upon the word than can be said to be put upon it by adopting the construction of the Court of Exchequer.

Moreover, the construction contended for on behalf of the plaintiff makes all these numerous remainders contingent, whilst the other construction makes one vested remainder, which alone is a strong reason in favour of the latter.

We therefore think that the judgment below should in this case also be affirmed.

Judgments affirmed.

Attorneys for plaintiffs: *Jennings.*

Attorney for defendants: *Gray, Johnston, & Mounsey.*

HIRSCHMAN *v.* BUDD.

1873
April 16.

Bill of Exchange—Alteration in Date—Plea Denying Acceptance.

An alteration in the date of a bill of exchange payable at a specified period after date is a material alteration; and where the bill is declared upon with its altered date, the defence is available to the acceptor under a traverse of the acceptance.

Parry v. *Nicholson* (13 M. & W. 778) discussed.

DECLARATION that the United Wine Growers of Hungary (Limited), on the 11th day of October, 1872, by their bill of exchange now overdue, directed to the defendant, required him to pay to them, or order, 71*l.* 10*s.* 6*d.* four months after date; that the defendant accepted the said bill, and the United Wine Growers of Hungary indorsed it to the plaintiff, but the defendant did not pay the same.

Plea traversing the acceptance of the bill. Issue.

The cause was tried before Martin, B., at the Middlesex Sittings in Easter Term last. The bill having been produced, and appearing to be dated on the 11th of October, the defendant proved that, when originally accepted by him, it bore date the 1st of October, and that after it had been so accepted and placed in circulation the date had been altered without his knowledge or assent from the 1st to the 11th of October. It was objected that this circumstance should have been specially pleaded, but the learned judge ruled that it was open to the defendant under the traverse of the acceptance, and (the jury having found that the alteration had been made after the bill had been accepted and issued, and had never been assented to by the defendant) a verdict was entered for the defendant.

J. O. Griffits moved for a new trial on the ground of misdirection. The alteration should have been specially pleaded. It is not such an alteration as rendered a new stamp necessary, nor is it the alteration of a part of the bill material for the purposes of pleading. The date of the bill, as alleged in this declaration, is immaterial, and the declaration would have been proved by the production of any bill for the specified amount payable four

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months after date. *Parry* v. *Nicholson* (1) is exactly in point; and the remarks of Parke, B., in that case as to the immateriality of the date of bills described as in the present declaration are applicable.

[POLLOCK, B., referred to *Cock* v. *Coxwell* (2) as being in conflict with *Parry* v. *Nicholson.* (1)]

The latter decision is the later in date, and must govern. (3)

KELLY, C.B. There should be no rule in this case. The declaration is upon a bill stated to have been accepted by the defendant on the 11th of October, 1872. The defendant, amongst other pleas, traversed the acceptance. The bill, when produced, appeared to be dated on the 11th of October; but evidence was given by the defendant that, when he accepted the bill, the date was the 1st of October, and he therefore denied that he ever entered into the contract declared on. I think it was open to him to do so under the traverse of the acceptance, and that he is entitled to retain the verdict entered for him on that issue. If the declaration had been on the bill in its original form, the alteration should, no doubt, have been specially pleaded; but the declaration being on the altered bill, no special plea was required.

But then we are pressed with the authority of *Parry* v. *Nicholson* (1), and especially with the observation there attributed to Parke, B., that the date of a bill is immaterial. Now, there can be no question that in some cases the date would be immaterial, and, although altered, the defendant would still be bound. In *Parry* v. *Nicholson* (1) the facts are not clearly stated; and the decision may perhaps be supported on the ground that, according to the evidence there given, the date was immaterial. But I cannot think that the learned judge could have laid down as a general principle that the date of a bill is not material, although it may have been true as to the particular case; and the cases he referred to do not by any means bear out any such general proposition. I will add, especially with regard to *Hemming* v. *Trenery* (4), on

(1) 13 M. & W. 778.

(2) 2 C. M. & R. 291.

(3) The declaration in *Cock* v. *Coxwell* (1 C. M. & R. 291) does not appear to have been in the same form as in *Parry* v. *Nicholson.* In the former case the date was alleged as part of the description of the bill.

(4) 9 A. & E. 926.

which he bases his judgment, that it was an action on a guarantee. The plea was non assumpsit. Upon the trial it was proved that the instrument had been interlined; but the first count of the declaration was upon it in its original form, and it was held very properly that the defence of alteration ought to have been specially pleaded.

MARTIN, B. I am of the same opinion. I cannot think that Parke, B., can ever have laid down generally that the defence of an alteration in date after the issue of a bill payable after date cannot be taken advantage of under the plea of non accepit. Such a statement is in direct contradiction to the case of *Cock* v. *Coxwell* (1); and the whole matter is fully discussed in the notes to *Master* v. *Miller* (2), where, after referring to the case of *Parry* v. *Nicholson* (3), the author lays down the rule to be that, where a plaintiff declares upon the instrument as altered, there the defendant may raise any available defence arising out of the alteration under a plea denying the contract; but where the count is on the instrument in its original state, a special plea is required; and to the same effect is a passage in Byles on Bills, 9th ed. p. 315.

POLLOCK, B. I also think this rule should be refused. The distinction between declarations on bills in their original and altered forms is well established. In the former case an alteration must be specially pleaded. In the latter the traverse of the acceptance is sufficient, and this distinction is recognised in the text-books—for instance, in Bullen and Leake, Precedents, 3rd ed. p. 532—and is supported by the case of *Cock* v. *Coxwell* (1), which was not referred to in *Parry* v. *Nicholson*. (3) In some cases the date of a bill may be immaterial, and may therefore be omitted in pleading in accordance with the Common Law Procedure Act, 1852, s. 49; but where it is material, and is stated, it must be proved as pleaded.

Rule refused.

Attorneys for plaintiff: *Harper, Broad, & Battock.*

(1) 2 C. M. & R. 291. (2) 1 Smith L. C. 6th ed. at p. 837.
(3) 13 M. & W. 778.

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May 15.

[IN THE EXCHEQUER CHAMBER.]

THE PLUMSTEAD BOARD OF WORKS *v.* INGOLDBY AND OTHERS.

Metropolis Local Management Acts, 1856 & 1862 (18 & 19 *Vict. c.* 120, *s.* 105; 25 & 26 *Vict. c.* 102 *s.* 77)—*Apportionment Payable by Future Owners—Charge on Land.*

The assessments for paving expenses apportioned by the vestry or district board under s. 77 of the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), are a charge upon the premises in respect of which they are assessed: and the amount may be recovered from the future owners of such premises, although there has been no arrangement to accept payment by instalments.

ERROR from the decision of the Court of Exchequer in favour of the plaintiffs on a special case.

The facts of the case, and the several clauses of the Acts of Parliament (18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102) upon which the question turned, are fully set out in the report in the court below. (1)

Waddy (*Prest* with him) argued for the defendants.

Barrow (*Morgan Howard* with him) for the plaintiffs, was not called on.

BLACKBURN, J. Mr. Waddy has argued this case very ingeniously, but he has failed to convince us. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed for the reasons there given.

KEATING, BRETT, GROVE, QUAIN, ARCHIBALD, and HONYMAN, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Jay & Dale.*

Attorneys for defendants: *Ingle, Cooper, & Holmes.*

(1) Law Rep. 8 Ex. 63.

WANT *v.* STALLIBRASS.

1873
May 6.

Vendor and Purchaser—Conditions of Sale—Waiver of Objections—Forfeiture of Deposit.

The defendant (with A., since deceased) sold a farm to the plaintiff under conditions of sale; by the 3rd condition it was stipulated that the vendors should deliver an abstract of title within seven days, and "all objections and requisitions not stated in writing and delivered to the vendors' solicitor within fourteen days from the delivery of the abstract shall be considered as waived, and in this respect time shall be of the essence of the contract;" and by the 14th condition, "if the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors," who were to be at liberty to resell, and recover any deficiency and the cost of resale from the purchaser. The plaintiff paid a deposit of 300*l.* An abstract of title was delivered within seven days; and from the abstract it appeared that the vendors sold as trustees under a will which devised the estate to them on trust to pay the income to F. S., the testator's son-in-law, for life, or to permit him to receive the same, and, after his decease, on trust to sell the estate and hold the produce "upon the trusts for the children of the said F. S. as therein mentioned;" it was further stated in the abstract that F. S. would join in conveying the property.

It was objected by the purchaser, but not till after the expiration of fourteen days from the delivery of the abstract, that F. S. being still alive, the vendors' power of sale had not arisen.

It subsequently appeared that the trusts of the will as to the produce of the sale were for the benefit of such of the children of F. S. by H. S., the testator's daughter, who should be living at testator's death, to be paid to them at twenty-one, or, if daughters, at twenty-one or on marriage, with limitations over for the benefit of survivors on the death of any child under twenty-one or before marriage. There were eight children of F. S. and H. S. living at the testator's death, of whom some had since married and settled their shares.

In an action brought by the purchaser to recover his deposit:—

Held, that he was entitled to succeed (by Kelly, C.B.) on the ground that no complete abstract had been delivered, and that therefore the time limited for taking objections had never commenced running; (by Martin and Pollock, BB.) on the ground that the 14th condition did not apply to the case of the vendors being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title.

ACTION brought to recover the sum of 300*l.*, being the deposit paid by the plaintiff on the purchase by him of an estate called Stone Farm.

At the trial of the cause before Martin, B., at Westminster, on the 20th of November, 1872, it appeared that on the 15th of September, 1865, the defendant and his co-trustee, since deceased,

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put up Stone Farm for sale by auction, subject to certain conditions, which (so far as material) were as follows:—

"3rd. Within seven days after the sale the vendors will, at their own expense, deliver to the purchaser an abstract of their title; all objections and requisitions not stated in writing and delivered to the vendors' solicitor within fourteen days from the delivery of the abstract shall be considered as waived, and in this respect time shall be of the essence of the contract."

"12th. The vendors, being trustees for sale, shall not be required to enter into any covenants other than the usual covenants against incumbrances, nor shall they be required to obtain the concurrence of any one interested in the proceeds of the sale."

"14th. If the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors, who shall be at liberty to re-sell the property, either by public auction or private contract, at such time and place, subject to such conditions, and in such manner as they shall think fit; and any deficiency in price on the re-sale, and all expenses attending the same, shall immediately afterwards be made good to the vendors by the defaulter at this present sale, or shall be recoverable as and for liquidated damages."

The defendant was the highest bidder at the sum of 1500*l.*; he signed the usual agreement to complete the purchase "according to the particulars and conditions of sale," and paid the deposit of 300*l.*

The abstract of title was forwarded to him on the 18th of September, and among the documents of title abstracted was the will of William Waylett, under which the vendors purported to sell the property. By this will the testator devised the property in question to the vendors, James Stallibrass and John Stallibrass, upon trusts, which were abstracted in the following terms: "Upon trust that they, his said trustees, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, should pay unto his son-in-law, Frederick Stallibrass, the annual produce or income arising from the said trust estate, or permit and suffer him to receive and take the same for his own use and benefit for and during the term of his natural life: and from and immediately after the decease of the said Frederick Stallibrass, upon trust

that the trustees or trustee for the time being of that his will should, with all convenient speed, absolutely sell and dispose of the said trust estate, either together or in parcels, and either by public auction or private contract, to any person or persons whomsoever, for such price or prices or sum or sums of money as to his said trustees or trustee for the time being should seem proper: And he thereby directed his said trustees to lay out and invest the proceeds, after payment thereout of all his just debts and funeral and testamentary expenses, and also all costs, charges, and expenses of and relating to such sale, conversion, and investment, in or upon some of the public stocks or funds, or on Government security, or at interest on freehold security in Great Britain, with power to alter or vary the same, and should stand possessed thereof upon the trust for the children of the said Frederick Stallibrass as therein mentioned," the trusts for the children of F. Stallibrass not being abstracted. (1)

It was stated in the margin of the abstract that F. Stallibrass would join in conveying the property.

No objection was made till the 13th of October, when it was objected on behalf of the plaintiff that, the tenant for life being still alive, the power of sale had not yet arisen, and the vendors could therefore make no title. The vendors replied that the objection came too late, but also that it was unsound. Some correspondence ensued, which ended in December, 1865, but no step was taken on either side until the 15th of September, 1871, when the plaintiff issued a writ (but did not serve it) to save the Statute

(1) These trusts were to pay, assign, transfer, and make over the trust fund unto or for the benefit of all and every the child or children of F. Stallibrass by the testator's daughter Harriett who should be living at the time of his (the testator's) decease, such payments, &c. to be made among them, if more than one, in equal shares, when and as such of them being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or be married, and if only one child the whole to be so paid, &c., at twenty-one, or if a daughter at twenty-one or marriage; with limitations over to the survivors in the event of any child dying under twenty-one, and (if a daughter) unmarried; and with provisions for maintenance and advancement.

It also appeared, upon the argument of the rule, that at the death of the testator (which happened in 1852) there were living eight children of Frederick and Harriett Stallibrass; that all these children had attained twenty-one, and that three of the daughters were married, and had settled their shares.

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of Limitations. This writ was renewed on the 14th of March, 1872, and on the 14th of June the plaintiff demanded the return of his deposit.

A verdict was taken for the plaintiff for 300*l.*, with leave to the defendant to move to enter a verdict for him, on the ground that the plaintiff did not deliver any objections or requisitions in writing to the defendant's abstract of title within the time limited by the conditions of sale in that behalf, and that the plaintiff's deposit for which this action was brought thereby became forfeited to the defendant, and that the facts proved at the trial disclosed no cause of action in the plaintiff; and if the Court should be of opinion that the plaintiff was entitled to recover, the Court was to say whether the plaintiff was entitled to recover any and what sum beyond the deposit for which the action was brought. A rule having been obtained accordingly,

April 26. *James, Q.C.*, and *Dixon*, shewed cause. First, there can be no doubt that, in fact, the power of sale had not arisen, the tenant for life, on whose decease it was to come into operation, being still alive: *Mosley* v. *Hide.* (1) Even a decree of the Court of Chancery could not have made the sale valid: *Blacklow* v. *Laws* (2); *Johnstone* v. *Baber* (3); and the concurrence of the tenant for life could only bind himself. If this is so, the condition does not apply, for the condition only has reference to imperfections in the title as deduced in the abstract, not to cases where the abstract shews affirmatively that the vendor has no title to sell or convey. Such an abstract is merely illusory, and it is as if A. purported to sell property, and furnished an abstract which shewed a title in X.; it would not enable the purchaser to prepare and tender a conveyance. If the condition would deprive the plaintiff of his right to claim a return of the deposit, it would also oblige him to pay the rest of his purchase-money, and to take a conveyance from persons who had absolutely no title to convey. No authority can be cited where such an effect has been given to a condition in this form, which is meant to meet the case of formal and technical objections, but not to entrap a purchaser into performance of a contract the consideration for which has wholly

(1) 17 Q. B. 91; 20 L. J. (Q.B.) 539. (2) 2 Hare, 40. (3) 8 Beav. 233.

failed. Secondly, the abstract was incomplete, in which case also the condition does not apply. An abstract "is complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser" (per Lord Eldon, in *Lord Braybroke* v. *Inskip* (1); but here, as in the similar case of *Lewin* v. *Guest* (2), where the abstract was on that ground held insufficient, "the title itself was out of the vendor," and "was not outstanding in any persons who were trustees for the vendor, or whom the vendor had any means of compelling to concur" in making the title good, or indeed who could have possibly made the title good. The abstract was therefore illusory. Further, in abstracting a will, "the limitations and uses should be accurately stated;" "if there are any trusts they should be stated;" "all modifications (of a devise) by proviso or otherwise should be accurately stated;" Sugd. Vend. & Pur., 14th ed. pp. 408, 410. All the documents which the vendor has should be fully abstracted: *Blackburn* v. *Smith* (3). If a material clause of an abstracted document is omitted from the abstract, the abstract is incomplete: *Oakden* v. *Pike* (4). Here the trusts of the will in favour of the children of the tenant for life were omitted, and the clause of the will, as it now appears, shews how material it was that the trusts should have been abstracted in full. Time, therefore, never began to run under the condition: *Hobson* v. *Bell.* (5)

Kingdon, Q.C., and *Tapping*, in support of the rule. The abstract was perfect; it is not necessary that every clause should be set out in full; it is sufficient if the effect is given: Dart, Vend. & Pur., 4th ed., p. 115; and it cannot be denied that the statement that the trusts were for the benefit of the children of F. Stallibrass gave quite sufficient information to enable the purchaser to take his objection. He is, therefore, now precluded from raising this objection, not having made it within the time limited by the conditions of sale. "The purchaser may, by his contract, preclude himself from objecting that the consent of a specified person is necessary, or that the sale is a breach of trust:" Dart, Vend. & Pur., 4th ed. p. 971, citing *Micholls* v. *Corbett* (6); see also

(1) 8 Ves. at p. 436
(2) 1 Russ. 325, at p. 329.
(3) 2 Ex. 783; 18 L. J. (Ex.) 187.
(4) 34 L. J. (Ch.) 620.
(5) 2 Beav. 17.
(6) 3 D. J. & S. 18.

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Murrell v. *Goodyear* (1). Moreover a good title could have been made under the Leases and Sales of Settled Estates Act 19 & 20 Vict. c. 120: *In re Shepheard's Settled Estate.* (2)

Cur. adv. vult.

May 6. The following judgments were delivered:—

KELLY, C.B. The plaintiff in this case seeks to recover the sum of 300*l.*, a deposit paid upon the sale by auction of an estate called Stone Farm, the plaintiff being the highest bidder, the defendant the vendor. By the conditions of sale, the vendors were to deliver an abstract of title within seven days, and all objections and requisitions not stated in writing and delivered to the vendors' solicitors within fourteen days of the delivery of the abstract were to be considered as waived; and time was to be of the essence of the contract. Further, the vendors were not to be required to obtain the concurrence of any one interested in the proceeds of the sale.

An abstract was delivered by the vendors within the seven days, by which it appeared that one Waylett had devised the estate to trustees, of whom the defendant was the survivor, in trust for his son-in-law Frederick Stallibrass, for his life, and "from and immediately after the decease of the said Frederick Stallibrass," upon trust that the trustees should with all convenient speed sell or dispose of the trust estate, and invest the proceeds and stand possessed thereof, "upon the trusts for the children of the said Frederick Stallibrass as therein mentioned." It is clear that the pretended title as it thus appeared on the abstract, was, in fact, no title at all, inasmuch as it being stated in the abstract that Frederick Stallibrass was still alive, the trustees had no power to sell the estate and could confer no title to it on the plaintiff. The cases cited at the bar of *Blacklow* v. *Laws* (3); *Johnstone* v. *Baber* (4); *Mosley* v. *Hide* (5), are conclusive to this effect. I am of opinion, therefore, that it was competent to the plaintiff at once to throw up the contract and proceed to recover his deposit back.

The defendant, however, contends that the abstract having been delivered within the seven days, the plaintiff was bound to make

(1) 1 D. F. & J. 432; 29 L. J. (Ch.) 425. 6 Jur. N.S. 356

(2) Law Rep. 8. Eq. 571.

(3) 2 Hare, 10.

(4) 8 Beav. 233.

(5) 17 Q. B. 91; 20 L. J. (Q.B.) 539.

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his objection within the fourteen days, which he certainly did not. This might have been so if the title disclosed had been merely a defective title, where, upon objection made, defects could have been supplied; but where the abstract, which ought to set forth a primâ facie good title, shews in express terms that the vendor has no power to make a title at all, it is not a case for objection and answer, but the abstract at once enables the purchaser to say that the vendor has broken, or has no means of performing, his contract, and that he is entitled to the return of his deposit.

But the vendor also contends that he has set forth enough of the will of Waylett in the abstract to shew that, the remainder being devised to children, it is possible that they, by concurring in the conveyance, may make the title good. But to this the answer is twofold. First, that he does not shew upon the abstract that, even if the concurrence of remaindermen could make a good title, there are any children, remaindermen, to concur; and next, and chiefly, the pretended abstract is in effect no abstract at all, and so no abstract can be said to have been delivered within the seven days. This appears from the authorities cited on both sides. Mr. Dart, relied upon by the defendant, lays it down that an abstract "as perfect as the vendor could furnish it at the date of delivery, although it might be of a defective title, is good, if it states with sufficient fulness the effect of every instrument that constitutes the title." But here the instrument that constituted the title was the will, and the only clause in it fully set forth shewed that the trustees had no power to sell; and the clause containing the devise of the remainder to the children was not fully set forth, but merely shewed that it was left to the children of Frederick Stallibrass and the clause, as now appearing upon the whole will coming before the Court, gives the remainder to children of F. Stallibrass by the daughter of the testator, but only such as should be living at his death and should attain the age of twenty-one; and the abstract is silent as to whether there were any such children, or whether any were living at the testator's death, or ever attained the age of twenty-one. Therefore this instrument, the will, being in the possession of the vendor, was not stated with sufficient fulness; and so the abstract was not as perfect as the vendor could furnish it, and so was not sufficient. Then the case of *Ogkden* v. *Pike* (1),

(1) 34 L. J. (Ch.) 620.

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cited for the plaintiff, shews that the omission of a clause in a will, if material, vitiates the abstract, and that an abstract which is incomplete is not an abstract at all, within the meaning of the condition. Here then, the abstract having shewn that the sale was unauthorized, a good title could have been made, if at all, only by the children of the marriage who had survived the testator and attained the age of twenty-one, becoming parties to the conveyance; and the abstract, by omitting this portion of the clause, gave the purchaser no opportunity of requiring information whether there were any such children, and whether, if there were, they were able and willing to become parties to the conveyance. And, though unnecessary to the decision of this case, I may observe that now that the facts are before us, it appears that there were children of the marriage who survived the testator, and had all attained the age of twenty-one; but one or more of them have settled their shares, giving interests to their children who are under age or who may come into existence hereafter, but are yet unborn. So that upon the whole evidence it is impossible for the defendant to make a good title.

POLLOCK, B. (1). The plaintiff in this action seeks to recover from the defendant the sum of 300*l.*, which was paid by him on the 15th of September, 1865, as the deposit on the purchase of an estate called Stone Farm, which the defendant on that day sold by auction, and for which the plaintiff was the highest bidder. The ground upon which the plaintiff alleges that he is entitled to recover is, that the defendant has failed to make a good title to the estate so sold. The defendant's answer is twofold. He says, first, that there is no valid objection to the title; and, secondly, that even if this be so, and that he, the defendant, could not enforce the sale by specific performance, or call on the plaintiff to pay the balance of the purchase-money, yet the plaintiff has forfeited his deposit by failing to comply with the conditions of sale.

With respect to the first contention on the part of the defendant the facts are these:—The defendant was devisee under the will of William Waylett, who devised the estate in question to the defendant upon trust to pay to the testator's son-in-law,

(1) Martin, B. concurred in this judgment.

Frederick Stallibrass, during his lifetime, the annual income arising from the said estate; and after the decease of the said Frederick Stallibrass, to sell the said estate and pay the proceeds to the children of the said Frederick Stallibrass. At the time of the sale Frederick Stallibrass and his children, eight in number and all of age, were alive. Under these circumstances it seems clear that the defendant had no such title to the estate as he could have compelled the plaintiff to accept, and, consequently, no action could have been maintained for the balance of the purchase-money. This proposition is thoroughly established by the cases cited for the plaintiff of *Blacklow* v. *Laws* (1), *Johnstone* v. *Baber* (2), and *Mosley* v. *Hide.* (3)

The defendant's second contention is based upon the conditions of sale, which, in so far as they are material, are as follows:—[The learned judge stated the conditions set forth above.] Where personal property is sold, it is not usual to add any condition of sale respecting the title of the vendor; and in the absence of any express stipulation, if the vendor cannot perform his part of the contract, the same ground that entitles the vendee to resist payment of the whole price entitles him also to recover back any deposit he may have made in part payment thereof, on the ground that there has been a total failure of consideration. In the case, however, of real property, the title to which is a matter requiring professional learning, an estate cannot change hands by sale without the interchange between the solicitors of the vendor and vendee of what are commonly known as an abstract of title, and objections to or requisitions thereon. Every vendor of freehold property is bound to furnish to the intended purchaser an abstract of all the deeds, wills, and other instruments which have been executed with respect to the land in question during the last sixty years; and if this is not done by a perfect abstract, the vendee may object or require further information. The very statement of this practice shews the necessity, where there is a sale by auction of real property, for conditions similar to those embodied in the present contract for sale; and it may well be that these may be so framed as to entitle a vendor to retain the deposit, although he cannot enforce the contract against the vendee. In this case the abstract

(1) 2 Hare, 40. (2) 8 Beav. 233. (3) 17 Q. B. 91; 20 L. J. (Q.B.) 539.

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of title which was furnished by the defendant as vendor, after bringing down the title to William Waylett, the testator, recited the terms of his will as follows:—[The learned judge stated the passage of the abstract set forth above.]

This abstract was sent to the plaintiff's solicitor on the 18th of September, 1865, and no objection to it was delivered until the 13th of October, when more than fourteen days had elapsed.

On the part of the plaintiff it was contended that this abstract was insufficient; first, because it shewed that the defendant could not give a good title during the lifetime of F. Stallibrass; and secondly, because it failed to disclose the real title of the defendant, inasmuch as it did not state that there were any children of F. Stallibrass living.

If the only question for our determination were whether the abstract was sufficient, I should incline to think that it was. The first objection, that it disclosed a faulty title, is met, in my opinion, by the answer, that provided a vendor gives a true abstract of the title which he has at the time, the abstract is good, although the title shewn by it is bad, and for this the ruling of Rolfe, B., afterwards upheld by this Court, in the case of *Blackburn* v. *Smith* (1) is a sufficient authority. As to the second objection, the reference in the abstract to the will of William Waylett and the trust created thereby for the children of F. Stallibrass, "as therein mentioned," in my view sufficiently called the attention of the vendee to the trusts created by the will to call on him to make objections or requisitions, and remove this case from the ground of decision acted upon in the cases of *Hobson* v. *Bell* (2) and *Oakden* v. *Pike*. (3)

But I do not think it necessary for us to pronounce any opinion upon either of these objections, because the question here is, not whether the abstract was sufficient (the words "sufficient abstract" are not used in the conditions of sale); the question is, has the plaintiff by any default on his part, or breach of the conditions of sale, debarred himself from his right to reject the insufficient title proferred to him and to recover back his deposit. The language of the 3rd condition is not that if the purchaser

(1) 2 Ex. 783; 18 L. J. (Ex.) 187.
(2) 2 Beav. 17.
(3) 34 L. J. (Ch.) 620.

does not deliver his objections or requisitions within fourteen days he is to forfeit his deposit, or be taken to have failed to comply with the conditions of sale, but that by such non-delivery within the specified time all objections and requisitions "shall be considered as waived;" and if the defendant's contention were correct, it would follow that the plaintiff, by not objecting within the stipulated time, waived all objections to title, and must not merely forfeit the deposit, but accept and pay for the estate.

Now the right of a vendee to a good title is a right, not merely growing out of the agreement between the parties, but is given by the law. This is affirmed by Lord St. Leonards in his work on Vendors and Purchasers, ch. 9, s. 1 (14th ed. p. 337), and is supported by the case of *Hall* v. *Betty* (1), and it would be putting a most unreasonable construction upon the conditions of sale to hold that the vendee, by failing to object to the abstract within the stipulated time, not merely waived any requirement as to further information or further security, which he might have properly enforced against a vendor who had a valid title, or one capable of being made valid, but that he became liable to accept a title wholly bad, when the very basis of the contract, apart from the conditions of sale, was that the vendor was bound to give a good title.

The case has been most carefully argued, but no authority has been cited for the proposition, nor do I think it is tenable.

The basis of the contract is that the vendor has a title, and although parties might by their conditions of sale waive even this, I do not think the plaintiff has done so; on the contrary, it appears to me that by failing to give any objection or requisition within the stipulated time he cannot be taken to have waived that which was the foundation of the whole contract, and which on the face of the defendant's own abstract is shewn not to exist. The rule to set aside the verdict for the plaintiff ought therefore to be discharged.

Rule discharged.

Attorneys for plaintiff: *Withall & Compton.*
Attorney for defendant: *M. K. Braund.*

(1) 4 M. & G. 410.

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CAPES *v.* BALL.

Bankruptcy Act, 1869, *s.* 126—*Resolution to accept Composition—Pleading.*

A resolution under the Bankruptcy Act, 1869, s. 126, by the requisite majority of creditors to accept in satisfaction from the debtor a composition upon the debts due, payable at a future time or by instalments, may be pleaded in bar to an action for the original debt, brought before any default on the debtor's part by a creditor bound by the resolution.

Edwards v. *Coombe* (Law Rep. 7 C. P. 519); *In re Hatton* (Law Rep. 7, Ch. 723), discussed.

Slater v. *Jones*.—DECLARATION by the trustee under proceedings for liquidation by arrangement of George Piggott and Edmund Smith, on a bill of exchange accepted by the defendant, and indorsed by the drawers to George Piggott and Edmund Smith before the presentation of the petition for liquidation.

Plea, that before the said bill was due the defendant summoned a meeting of his creditors in the manner prescribed by the Bankruptcy Act, 1869, after due notice, and the requisite majority, by an extraordinary resolution, resolved "that a composition of six shillings in the pound on the amount of the defendant's debts, whereof two shillings should be payable in four months, and two shillings in eight months, and two shillings in twelve months from the complete registration of the resolution, should be accepted in satisfaction of the debts due from the defendant to his creditors respectively;" averment of compliance with all the provisions of the Bankruptcy Act, 1869, and that all things were done, &c., necessary to make the said resolution binding on all the creditors of the defendant, including the plaintiff; and to make the said composition a bar to the causes of action pleaded to.

Replication that the time for the payment of any part of the said composition had not elapsed, and no part of the same had been tendered or paid to the plaintiff.

Demurrer and joinder.

Capes v. *Ball*.—Declaration by indorsee against acceptor of a bill of exchange.

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Plea, that after accepting the said bill the defendant, in conformity with the provisions of the Bankruptcy Act, 1869, presented a petition for liquidation by arrangement, and at a general meeting of creditors, a resolution was passed by the requisite majority "agreeing to accept a composition of one shilling in the pound from the defendant, to be paid within three months after the final registration of the resolution;" averment of compliance with all the provisions of the Bankruptcy Act, 1869, and that all things, &c., happened to bind the plaintiff; and that the said composition was not payable at the commencement of the action, nor is the same now payable.

Demurrer and joinder.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126, enacts that "the creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. . . . . The provisions of a composition accepted by an extraordinary resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom are shown in the statement of the debtor produced to the meetings at which the resolution was passed, but shall not prejudice or affect the rights of any other creditors."

Thesiger, in support of the demurrer to the replication in *Slater* v. *Jones*, contended that it was no answer to the plea, inasmuch as the composition resolution was itself a satisfaction of the debt, and although upon default in payment of an instalment an action could be maintained for the original debt, according to the cases of *Edwards* v. *Coombe* (1) and *In re Hatton* (2), still until default no action could be brought. This was clearly the opinion of Willes, J., in *Edwards* v. *Coombe* (3), and is not inconsistent with the judgments of James and Mellish, L.JJ., in *Re Hatton*. (2)

R. H. Reid, contrà. The cases cited show that after default an action can be maintained for the original debt. But if so, the composition resolution cannot be pleaded in bar, even before de-

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 7 Ch. 723.
(3) Law Rep. 7 C. P. at p. 522.

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fault. For if pleadable now, the effect would be to extinguish the debt according to the principle laid down in *Ford* v. *Beech* (1) that a right of action once suspended is gone altogether. There is no injustice in holding that the mere resolution cannot be pleaded, as in any instance in which an action was improperly brought, the Court of Bankruptcy would restrain the plaintiff by injunction. The resolution is by the Act of 1869 put in the place of the composition deed under the Act of 1861, and such a deed could not be pleaded unless it contained a release in terms or words equivalent to a release. *Ipstones Park Iron Company* v. *Pattinson* (2); *Clarke* v. *Williams.* (3)

Thesiger in reply. The doctrine of *Ford* v. *Beech* (1) is inapplicable. There is nothing to prevent a man being debarred from suing for his debt under one set of circumstances and yet capable of suing for it under another. For instance, suppose a plaintiff had assigned his debt to a person who gave notice to the defendant, and then sued for it. The defendant would have a good answer on equitable grounds; see *Jeffs* v. *Day* (4); and yet, as Blackburn, J., points out in his judgment (at p. 374), in that case, if the debt revested the creditor would have a right to sue, and the judgment for the defendant in the first action could not, under such circumstances, be successfully pleaded as res judicata: *Phillips* v. *Ward* (5); *Walker* v. *Nevill.* (6) It is true that no deed under s. 192 of the Bankruptcy Act, 1861, without a release and equivalent words, was pleadable. But in construing the statutory resolution under the present Act, the decisions on the language of the deeds executed under the former Act are no guide.

[BRAMWELL, B., referred to *Good* v. *Cheesman* (7) and Starkie on Evidence, vol. ii. p. 17, tit. Accord, as shewing that the mere composition resolution might be pleadable in bar until default.]

Wood Hill argued for the plaintiff in *Capes* v. *Ball*, and referred, in addition to the cases relied on by *Reid*, to *Ray* v. *Jones.* (8)

Haselfoot, contrà, was not called on.

(1) 11 Q. B. 852; 17 L. J. (Q.B.) 114.
(2) 2 H. & C. 828; 33 L. J. (Ex.) 193.
(3) 3 H. & C. 508; 34 L. J. (Ex.) 60; S. C. in Ex. Ch. 1001; 34 L. J. (Ex.) 189.
(4) Law Rep. 1 Q. B. 372.
(5) 2 H. & C. 717; 33 L. J. (Ex.) 7.
(6) 3 H. & C. 403; 34 L. J. (Ex.) 73.
(7) 2 B. & Ad. 328.
(8) 19 C. B. (N.S.) 416; 34 L. J. (C.P.) 306.

(2) 5 C 10 Jur N.S. 428
(5) 5 C 9 Jur N.S. 1182
(6) 5 C 11 Jur N.S. 246

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KELLY, C.B. I am of opinion that the defendants in these actions are entitled to our judgment. The question raised in each is the same, and is whether a creditor who is bound by a resolution to accept a composition to be paid by instalments or at a future time by a debtor, passed in conformity with the 126th section of the Bankruptcy Act, 1869, can sue the debtor for his whole debt before the time has come for the payment of any instalment, or of the composition.

Now, much stress has been laid upon the cases decided under the Bankruptcy Act of 1861; but there is a fundamental distinction between the provisions of that Act and of the present Bankruptcy Act. Under the former statute a prescribed majority of creditors could bind all to the provisions of any composition deed to which such majority should agree, and all that the 192nd section enacts is that the deed, whatever its provisions, should, upon certain conditions being complied with, bind all the creditors. The effect of each deed must of course be considered by itself. In one, provisions might be inserted amounting to an absolute extinction of the debt; in another there might be no words having that effect; and if the intention of the parties was that the deed should be a bar, it was necessary to express it in plain words. That being so, I think the courts rightly decided that in construing those deeds the ordinary rules of law must be applied, and the intention of the parties be gathered from the words used; and, applying those rules, it was properly held that a deed which did not contain a release, or words equivalent to a release, could not be pleaded. But by the present law the machinery of arrangement is entirely altered. Compositions are no longer carried out by deed, but by resolution; and we have to say what the true construction of the statute is. The matter depends upon the 126th section, which provides that the creditors may, by an extraordinary resolution, resolve, "That a composition shall be accepted in satisfaction of the debts due to them from the debtor." Could the legislature have intended that a creditor who has assented to, or is bound by the resolution, should the next day commence an action against the debtor for his whole debt? Such a construction seems to me to be repugnant to common sense, and certainly one which is not forced upon us by any of the decided cases. Here the creditors have become bound by a resolu-

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tion that a composition to be paid by instalments, or at a future time, shall be accepted in satisfaction; and I think that a person who is bound by such a resolution is also bound, by necessary implication, not to sue the debtor before the time for payment comes, and until default is made. This construction receives confirmation from many of the cases cited, and especially from those referred to by my Brother Bramwell, and collected in the 2nd Volume of Starkie on Evidence, p. 17, whence it appears that an agreement by all the creditors to accept a composition, though not properly an accord and satisfaction, is really a new agreement for which the consideration to each creditor is the forbearance of all the others. A creditor who is party to such an agreement cannot sue for his original debt in contravention of the rights of the others.

It remains to add a few words on the cases of *Edwards* v. *Coombe* (1), and *In re Hatton* (2). With regard to the latter, I do not dissent in any way from the decision. The general expressions used by Mellish, L.J., must be taken secundum subjectam materiem; and do not seem to me to be applicable to a case where there has been no default in paying the agreed composition. The same remark is applicable to the judgment of Willes, J., in *Edwards* v. *Coombe*. (1) Indeed, it is clear, from the language of the earlier part of his judgment, that he was of opinion that no action could have been maintained until default.

Then it is contended that the case of *Ford* v. *Beech* (3) interposes an insurmountable difficulty in the defendants' way; for if the composition resolution is a good bar now, the right of action for the debt would be gone for ever; and according to the decisions I have just referred to, it is clear that the right is not gone, but exists if the debtor makes default. *Ford* v. *Beech* (3), however, has no application here. For all that it is necessary to decide is that although, rebus sic stantibus, the plaintiffs have no cause of action, in another state of circumstances a cause of action may accrue to them; and *Edwards* v. *Coombe* (1) evidently contemplates that such may be the case. I see no difficulty, therefore, in holding that the present actions will not lie, although in a certain event the

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 7 Ch. 723.
(3) 11 Q. B. 852; 17 L. J. (Q.B.) 114.

original debts might be sued for, just as a certificate in bankruptcy might be used as a bar to an action for the debt, and yet the same debt could afterwards be sued for if the certificate were set aside for fraud; or again, just as no action can be successfully brought for the price of goods for which a bill of exchange has been given whilst the bill is running, and yet the price can be sued for after the bill has been dishonoured.

MARTIN, B. I am of the same opinion. I think the plea good and the replication bad in the first action, and the plea good in the second action. I do not feel at all embarrassed by the decisions which have been referred to upon the Act of 1861. By the 192nd section it was enacted that "every deed or instrument made or entered into between a debtor and his creditors" upon certain conditions should bind all; and the courts of law, which at first had some difficulty in holding a dissentient creditor bound by the provisions of a deed to which he was no party, at length came to the conclusion that the deed alone was to be looked at in each case, and interpreted both as regards assenting or dissenting creditors in accordance with the ordinary rules governing the construction of deeds. But these decisions have no application to cases under the 126th section of the Bankruptcy Act, 1869. That is an Act "to consolidate and amend the law of bankruptcy." Now the meaning of bankruptcy was, that a trader (and now any person) might on certain terms get released from all his debts, and have a certificate of protection or an order of discharge. But it becoming notorious that liquidation by arrangement was in fact very common, the modern statutes contain a code for regulating such liquidations, and also a code for regulating compositions with creditors, which contemplates the retention of his property by the debtor and his obtaining the protection of the Bankruptcy Acts upon agreeing to pay a specified composition. The composition is the essence of the transaction; and it is with "composition with creditors" that part vii. of the Act of 1869 deals. Sect. 126 enacts that the creditors may resolve that "a composition shall be accepted in satisfaction of the debts due to them from the debtor," and further, that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be bind-

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ing on all the creditors whose names and addresses and the amount of debts due to whom are shewn in the statement of the debtor produced to the meeting at which the resolution was passed." Now I do not think that the words "a composition" are equivalent to "payment of a composition," but that the true construction of the section is, that a creditor who is a party to or bound by the resolution must stay his hand, and cannot the next day after the resolution has passed sue out a writ in respect of his original debt. He cannot sue until there has been default on the debtor's part.

I may add that, for my own part, I doubt whether the effect of the statute is not to give the creditor the agreement for a composition in the place of his debt. But I do not desire without further consideration to dissent from the judgments of the Lords Justices in *In re Hatton* (1) and of the Court of Common Pleas in *Edwards* v. *Coombe* (2).

With regard to *Ford* v. *Beech* (3), the principle there laid down (at p. 867) that, "The right to bring a personal action once existing and by the act of the party suspended for ever so short a time is extinguished and discharged and can never revive" may be quite true, but in my opinion it has no application here. Moreover, the principle has itself been the subject of much comment in recent cases, and it has been suggested by the late Mr. Justice Willes that many of the difficulties caused by a rigid application of it are removed by construing covenants not to sue, except in certain circumstances, as releases with conditions subsequent. (4)

BRAMWELL, B. I am of the same opinion, though not without some hesitation; but I think that to hold that no action is maintainable until default is made, is a possible construction of the terms of the statute, and certainly a more convenient construction than to hold that an action may be brought subject to its being restrained upon application by the defendant to a court of equity or bankruptcy. Moreover, the authorities in reference to agreements, apart from the statute, are in harmony with this view, and

(1) Law Rep. 7 Ch. 723.
(2) Law Rep. 7 C. P. 519.
(3) 11 Q. B. 852; 17 L. J. (Q.B.) 114.
(4) See *Newington* v. *Levy*, Law Rep. 5 C. P. 607; Law Rep. 6 C. P. 180.

shew that an agreement to accept a composition by resolution may well be held to be a bar to any action until default, and in fact equivalent to an accord and satisfaction. The cases (including *Good* v. *Cheesman* (1)) are collected in the note to Starkie on Evidence, tit. Accord (vol. 2, p. 17), to which I referred during the argument, and establish that an agreement by a man's creditors to accept a composition, though not in strictness an accord and satisfaction, is nevertheless binding, and can be set up as a defence to an action for the original debt, it being in fact a new agreement with the defendant, the consideration of which to the creditor is the forbearance of all the other creditors. Thus in *Boyd* v. *Hind* (2) Williams, J. (at p. 947), states the law to be as follows: "The law with respect to defences founded on compositions between a debtor and his creditors appears not to have been distinctly defined until the case of *Good* v. *Cheesman*. (1) It used to be sometimes laid down that a right of action once vested could only be barred by a release, or by an accord and satisfaction. But since the decision of that case the law has been regarded as settled that a composition agreement by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt if he accepted the new agreement in satisfaction; and that for such an agreement there is a good consideration to each creditor, viz., the undertaking of the other compounding creditors to give up their claim. But no such agreement can operate as a defence if made merely between the debtor and a single creditor; the other creditors or some of them must join in the agreement with the debtor and with each other, for otherwise it would be a bare contract to accept a less sum in satisfaction of a greater which would be invalid by reason of want of consideration for relinquishing the residue." If this be a correct view of the law, it goes to shew that we may well regard this composition resolution a good bar to the present action; and the decisions on the Act of 1861, which are upon the construction of the composition deed in each particular case, do not in my opinion affect the question.

So far, then, upon reason and principle, I am disposed to think

(1) 2 B. & Ad. 328. (2) 1 H. & N. 938; 26 L. J. (Ex.) 164.

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the pleas good. But now comes this difficulty, and it has been well put both by Mr. Reid and Mr. Hill. Two cases have decided that an action is maintainable for the original debt after the debtor has made default in paying an instalment of the composition. But if so, it is said this action must also be maintainable, because if it can be barred now it is barred for ever, upon the principle of *Ford* v. *Beech*. (1) Now I agree with the judgment in that case that a suspension of a right of action cannot be a defence, for if it were the action would be gone for ever, and I feel a difficulty in understanding the observation upon the revesting of causes of action by Blackburn, J., in *Jeffs* v. *Day*. (2) At the same time I do not think that the authorities cited, coupled with *Ford* v. *Beech* (1), are conclusive. Certainly in *In re Hatton* (3) Mellish, L.J., does not say that the resolution would not be a bar to proceedings commenced before default; and in *Edwards* v. *Coombe* (4) Willes, J., indicates that his opinion was the contrary. I think, therefore, we can assent to these two decisions, and yet hold the pleas good thus:—Either this resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the event happens whereby it is defeated (i.e., the debtor's default) a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that, in case he fails to pay the composition at the time agreed, he will pay the whole debt. And to insert these terms is strictly in accordance with *Good* v. *Cheesman* (5), where Parke, J., expressed his opinion that upon default in performance of the terms of the agreement an action would lie, and also with the justice of the case. For suppose a creditor accepts a composition on a debt four years old, payable at the end of two years, and then the debtor makes default, is the creditor to be bound to sue on his original debt? If so he will fail, for the statute of limitations would be a good defence, whereas if there is a new agreement by the debtor at the date of the composition resolution the creditor's remedy would be preserved. It is true the action in the Common Pleas (*Edwards*

(1) 11 Q. B. 852; 17 L. J. (Q.B.) 114.
(2) Law Rep. 1 Q. B. 372, at p. 374.
(4) Law Rep. 7 Ch. 723.
(5) Law Rep. 7 C. P. at p. 522.
(6) 2 B. & Ad. 328.

v. *Coombe* (1)) was on the original bill, but the point I have last suggested was not made.

I think, therefore, the pleas are good, and that upon default there is either a defeasance or—and I think this the preferable view—a right of action upon an implied agreement to pay in case of default entered into by the debtor at the date of the composition resolution.

POLLOCK, B. I am of the same opinion, but I have had considerable doubt upon the matter during the argument. Under the Act of 1861 arrangements were carried out by deeds, and in construing them the ordinary rules of construction governed, and the deeds, although by statute they were made binding on dissentient creditors, were those of the parties, and unless they contained a release, or words equivalent to a release, were not pleadable in bar. But the Act of 1869 substituted a resolution for a deed, and we should, I think, interpret the Act not exclusively by the light of the old decisions on composition deeds, but we ought to give the widest effect to the words so as to carry out the intention of the statute, which, as has been pointed out, was to free a debtor entirely from his liabilities. And without recapitulating the reasoning of my Lord and my learned brothers, I will only say that I think we can hold these pleas to be good without straining in any way the language of the 126th section, and without impeaching the correctness of any of the cases which have been cited.

Judgment for the defendants in each action.

Attorneys for plaintiffs in 1st and 2nd actions: *Plunkett; Apps.*

Attorneys for defendants in 1st and 2nd actions: *Piesse & Son; J. G. Watson.*

(1) Law Rep. 7 C. P. 519.

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May 12.

[IN THE EXCHEQUER CHAMBER.]

THE SHEFFIELD WATERWORKS COMPANY *v.* BENNETT.

Water Rate—Rent—Annual Value—Landlord paying Rates.

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By their local Act (16 Vict. c. xxii.) s. 79, the plaintiffs were bound to supply the houses within a certain district with water "at the following rate per annum, that is to say, where the *rent* of such dwelling-house" should not amount to 7*l.* per annum, at a rate not exceeding 6 per cent. per annum on such *rent*, but not exceeding 7*s.* 2*d.* per annum; and so on in a graduated scale.

The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district rate:—

Held (affirming the judgment of the Court below), that "rent" in s. 79 was equivalent to "annual value;" and that, in estimating the rents on which the water rate was payable, the defendant was entitled to deduct the rates so paid by him.

Error on the judgment of the Court of Exchequer delivered in favour of the defendant, on a special case raising the question whether, under the local Act of the Sheffield Waterworks Company (16 Vict. c. xxii.), the "rent" upon which the plaintiffs were entitled to calculate the water-rate payable under their Act, was, as they contended, the actual rent paid to the landlord, or was, as the defendant contended, to be taken as equivalent to "annual value." The case is fully reported in the Court below. (1)

Field, Q.C. (*James*, Q.C., *Kemplay*, Q.C., and *Barker*, with him), argued for the plaintiffs.

Manisty, Q.C. (*Cave* with him), for the defendant, in support of the judgment below, was not called upon.

The Court (Blackburn, Keating, Brett, Grove, Archibald, and Honyman, JJ.) affirmed the judgment, saying, that although there were, as the Court below had pointed out, great difficulties in the way of the construction contended for by the defendant, there were also many and great objections to the construction of the plain-

(1) Law Rep. 7 Ex. 409.

tiffs, and agreeing with the Court below that the latter objections preponderated over the former.

Judgment affirmed.

Attorneys for plaintiffs: *Pitman & Lane, for R. B. Smith, Sheffield.*

Attorneys for defendant: *Pattison, Wigg, & Co., for Broomhead & Co., Sheffield.*

[IN THE EXCHEQUER CHAMBER.]

May 10.

MORRISON *v.* THE UNIVERSAL MARINE INSURANCE COMPANY.

Marine Insurance—Concealment—Election to avoid Contract—Delivering out Policy.

The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria* without disclosing to the defendants certain information in his possession, which it was material that they should know (October 10th). In so doing he acted in good faith, supposing from inquiries that he had made that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 13th) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14th or 15th). Upon receiving news of the loss of the vessel, they gave notice to the plaintiff that they did not consider the policy binding on them (October 20th). On the trial of the action upon the policy, the learned judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion, whether the defendants had elected to go on with the policy. The jury having found that the defendants did not so elect, and a rule for a new trial on the ground of misdirection having been obtained and afterwards made absolute in the court below:—

Held (reversing the judgment of the Court below), that this direction was right; and that there being no election in fact, and no evidence that the plaintiff had been prejudiced by the defendants not electing earlier to disaffirm the policy, the defendants were not estopped from denying its validity, nor was it material to consider whether their conduct in delivering out the policy without a protest had been such as to entitle the plaintiff to consider it as an election.

APPEAL against the decision of the Court of Exchequer directing a new trial on the ground of misdirection. (1)

(1) Ante, p. 40.

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Feb. 14. *Benjamin, Q.C.* (*Batt, Q.C.*, and *J. R. Mellor* with him), argued for the appealing defendants.

Holker, Q.C., (*Herschell, Q.C.*, and *McConnell* with him), for the plaintiff.

The rule below was granted on the ground (amongst others) that the verdict was against the weight of evidence (1), but it was only made absolute on the ground of misdirection; and no leave was given to the plaintiff to appeal on that part of the rule which related to the alleged misdirection as to *Lloyd's Lists*, on which the Court below were unanimous. The appeal was therefore confined to the alleged misdirection as to election. On the argument of the appeal, however, *Holker, Q.C.*, beside urging the arguments used below on that point, contended also that the verdict was wrong; but the Court refused to allow this matter to be gone into.

Cur. adv. vult.

May 10. The judgment of the COURT (Blackburn, Keating, Mellor, Lush, Honyman, JJ.) was delivered by

HONYMAN, J. This is an appeal by the defendants from a decision of the Court of Exchequer, making absolute a rule obtained by the plaintiff for a new trial.

The action was brought by the plaintiff, the owner of the ship *Cambria*, on a policy on chartered freight, dated the 12th of October, 1870, for 500*l*. The defendants pleaded, among other pleas, concealment of a material fact. The case came on for trial before Blackburn, J., at the Liverpool Winter Assizes, 1871. The following were the facts proved, so far as is material to the question before us: The insurance in question was effected by the plaintiff through his brokers in London, Messrs. Previté & Greig. On the 8th of October, 1870, the plaintiff gave orders to his brokers to insure 5000*l*. on the ship and 5000*l*. on freight, and, on the 10th, he sent to Messrs. Previté & Greig a telegram in the following words: "10th October, 1870. Since writing Saturday, paragraph in *Mercury*, '*Cambria*, quære *Cameo*, from New Orleans, aground on North Breaker.' To-day's *Mercury* says: 'The vessel on the North Breaker, reported yesterday as the

(1) See ante, p. 48.

Cambria, is stated to be the *Cameo* from New Orleans.' Can you find out at Lloyd's? Let me know by wire before acting." The broker, upon receipt of the orders and telegram, proceeded to endeavour to ascertain whether the ship reported to be aground was or was not the *Cambria*. He accordingly (as was admitted on the part of the defendants), in good faith, proceeded to cover the risk, and prepared the usual slip, and, on the 12th of October, 1870, a line of 500*l.* was taken by the defendants' assistant-underwriter, Mr. Prichett (in the absence of Mr. Fisk, the principal underwriter), and that slip was initialed by him.

The broker did not communicate to Mr. Prichett the orders he had received from the plaintiff or the telegram of the 10th, or give the underwriters the opportunity of judging for themselves whether the ship reported to be aground was or was not the *Cambria*.

Information relating to the grounding of the *Cambria* had appeared in *Lloyd's List* of the 8th of October, but, by mistake, had not been inserted in the loss book, and was not so inserted till the 12th of October, after the risk had been taken by the defendants. This was seen by Mr. Prichett shortly afterwards on the same day, and he then learnt from the broker that he had been in possession of the information which he had not communicated to him.

It was admitted that in effecting marine insurances the matter is considered merely as negotiation till the slip is initialed, but that when that is done the contract is considered to be concluded.

It was proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, notwithstanding anything that might happen after the initialing of the slip. But it was not stated to be the usage to do so without protesting or notifying to the assured that it was the intention of the underwriters, notwithstanding the delivery of a stamped policy, to rely on the concealment, and as, in general, the concealment is not discovered till after the policy is issued, there probably was no usage on the subject.

It was further proved to be the practice of the defendants always to date the policy as of the date of the slip, and that the

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ordinary course of business in the defendants' office is, that the slips, after being initialed, are sent from the underwriters' department to the secretary's department, and there stamped policies are filled up by the clerks in accordance with the slips, and signed by the directors, and left in the office until called for by the brokers. Accordingly, the clerks filled up a stamped policy in accordance with the slip, dating it as of the 12th of October, 1870, and this was executed by the directors on the 14th or 15th of October, and deposited in the usual way in the office, and taken away by the broker's clerk on the 14th or 15th. In the meantime, viz., on the 13th of October, Mr. Fisk had returned to London, and was then informed by Mr. Prichett of the circumstances attending the taking of the risk, and that the information had not been communicated to him, but it did not appear that Mr. Fisk took any steps in the matter, though he stated that he was the person whose duty it would be, on ascertaining there had been a concealment, to determine whether the insurance should be carried out.

On the 19th of October, news was received that the ship lost was the *Cambria*, and the defendants on the next day gave notice to the brokers that they repudiated all liability. Except this, the defendants never gave any notice to the plaintiff or his brokers, or protested in any way against being liable on the policy. The premium was debited to the broker in the usual way, but was not payable till the 8th of November, and was tendered to the defendants after the 20th of October, but refused by them.

The learned judge told the jury that when an underwriter discovers that there has been a material concealment in effecting the insurance, he is not bound to put an end to the policy, but has a right at his election to say, "'You have been guilty of a concealment which would entitle me to determine the policy, but I prefer to go on with it;' . . . but he cannot say, 'I elect to go on,' and then, when he hears there is a loss, say, 'Now, that I hear there is a loss I will not recognise the policy.' . . . He cannot keep the contract and get rid of it too. He has a right to say, 'Take back your premium and make the contract a nullity.' He has also a right to say, 'You have done what has entitled me to get rid of the contract, but I will keep the premium and go on.' He has a perfect right to

do either of those things, and when he has got notice of the concealment, he is bound to make his election within a reasonable time; he is not bound to do it with desperately hot speed. A man cannot wait to take his chance, he must elect within a reasonable time."

The learned judge then examined the evidence, and pointed out to the jury that Mr. Prichett knew on the 12th of the concealment by the broker; that on that day he told Mr. Fisk so, and that Mr. Fisk was the man to determine whether the premium should be returned; that he knew on the 13th of October of the non-disclosure, and that he might have returned the premium, or had a right to say he would return the premium, and that the return of the premium would indicate that he considered that he was not liable; that no doubt, if he had offered to return the premium, Mr. Previté's answer would have been, 'I will not take it,' but still that Mr. Fisk had no right to hold the premium; that he could not play fast and loose; but must either adopt or refuse it.

The learned judge further told the jury that, although a good deal had been said about the slip and the stamped policy, he thought that, as regarded that part of the case, it made no difference whatever, and remarked, that he believed (though the jury probably knew better than he did) that it had been quite correctly stated that the putting it on the slip was considered in fair dealing and mercantile understanding as being the contract, as if it were made on that day. That this would equally apply if the contract had actually issued as a stamped policy. The learned judge again drew the attention of the jury to the fact that Mr. Prichett knew of the concealment on the 12th, and Mr. Fisk on the 13th, that it was not till the 20th, after the news of the loss, that any step was taken by the defendants, and he then asked the jury, "Do you think that the defendants, having the opportunity (taking into account that they should make the election within a reasonable time), had elected to go on with the contract? If so, that puts an end to the defence. On this I express no opinion at all. I leave this entirely to you."

Four questions were left by the learned judge to the jury. The first is immaterial as regards the questions before us. In answer to the second, the jury found that the concealment was a material one. In answer to the third, viz., whether the broker had a right

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to suppose that the underwriters were acquainted with *Lloyd's Lists*, they said, No. In answer to the fourth question,—did the defendants' company, after knowledge that the broker had not disclosed this fact, elect to treat the policy as subsisting?—the jury replied, No.

The learned judge thereupon directed the verdict to be entered for the defendants.

In Hilary Term, 1872, Mr. Holker, for the plaintiff, obtained a rule nisi for a new trial on the ground of misdirection, the misdirection alleged being, that the learned judge ought to have told the jury that the defendants were to be presumed to know the contents of Lloyd's Lists, and that the plaintiff was not bound to communicate information contained in them, and that, on the facts found, with reference to the execution of the policy without protest after knowledge of the concealment, the judge ought to have directed the jury to find for the plaintiff; and also on the ground that on the question of election, the verdict was against the weight of evidence. After argument, the rule was made absolute for a new trial by the majority of the Court of Exchequer (Martin and Bramwell, BB., Cleasby, B., dissenting).

From this decision the defendants appealed, and we have now to determine whether the case ought to go down to a new trial.

Upon the argument, it was admitted by Mr. Holker, who appeared for the plaintiff, that as the Court of Exchequer was unanimous on that part of the rule relating to *Lloyd's Lists*, and as no leave to appeal was given, it was not open to him to contend before us that the verdict could be upset on that ground. He also admitted that he could not contend that as matter of law the judge was bound to tell the jury that the circumstances before mentioned relating to the delivery of the policy amounted to an election to go on with the insurance. But he drew our attention to the facts that the defendants had made no fresh entry in their books; that they had not struck out the debit of the premium; and that the usage as found was only a usage to deliver out a stamped policy, so as to enable the assured to raise the question; and that it was not found to be the usage to deliver it without a protest or reservation of the underwriter's rights; and he contended that the learned judge ought to have told the jury that the defendants by not protesting

when they issued the policy (as was done by the underwriters in the case of *Nicholson* v. *Power* (1), and by remaining quiescent from the 13th of October, when Mr. Fisk became aware of the concealment, down to the 20th of October, when they became aware of the loss of the ship, had allowed the plaintiff to remain under the belief that he was insured, and could not, on hearing of the loss, repudiate their liability. He further submitted, that the learned judge ought to have explained to the jury what amounted to the exercise of election, and that his omission to do so was equivalent to a misdirection.

In our opinion, this contention is ill founded. The law as to the rights of a person who has been induced by fraud to enter into a contract has recently been laid down by this Court in the case of *Clough* v. *London and North Western Ry. Co.* as follows (2): "The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. This was not controverted at the bar, and it is not necessary to cite authorities for it. And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And, as stated in Com. Dig. Election, C. 2, if a man once determines his election it shall be determined for ever; and as is also stated in Com. Dig. Election, C. 1, the determination of a man's election shall be made by express words or by act. And, consequently, we agree with what seems to be the opinion of all the judges below, that if it can be shewn that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture. If with knowledge of the forfeiture,

(1) 20 L. T. (N. S.) 580. (2) Law Rep. 7 Ex. at p. 34.

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by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election and cannot afterwards waive the forfeiture: *Jones* v. *Carter*. (1) We cannot do better than cite the language of Bramwell, B., in *Croft* v. *Lumley* (2), which precisely expresses what we mean. He says 'The common expression "waiving a forfeiture," though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not avoid the lease, and he may do so by deed or by word; if with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, and does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election?' In all this we agree and think that, mutatis mutandis, it is applicable to the election to avoid a contract for fraud. In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and, when the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined. But we cannot see any principle, and are not aware of any authority for saying, that the mere fact that one who is a party to the fraud has

(1) 15 M. W. 718. (2) 6 H. L. C. at p. 705; 27 L. J. (Q. B.) at p. 330.

issued a writ and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind."

In the case now before us, the learned judge expressly told the jury that if the defendants had elected to go on they could not afterwards, on hearing of the loss, repudiate their liability; and left to the jury to say whether the defendants had elected to go on with the contract, calling their attention pointedly to the fact that Mr. Fisk, whose duty it was to determine the question whether the insurance should be repudiated, knew all the circumstances on the 13th, and that nothing was done by the underwriters to repudiate their liability till the 20th, after the receipt of the news of the loss.

It is true that the learned judge told the jury that he himself attached no weight to the handing out of the stamped policy. But even if we were of opinion that more weight might have been attributable to this view than was given to it by the learned judge, this would not amount to a misdirection, nor can we see that the learned judge failed in any way properly to explain to the jury the nature of an act of election.

The learned judge further told the jury that they were to consider whether the election was exercised within a reasonable time, telling them that the party entitled to elect must do so within a reasonable time. It is not necessary to consider whether this direction is correct, or whether the party entitled to elect may not do so at any time, unless in the meantime he has elected to affirm the contract, or unless the rights of third parties have intervened, or the other party to the contract has altered his position, under the belief that the contract was a subsisting one; for, if the latter be the correct view, the direction of the learned judge was too favourable to the plaintiff, and of course he cannot complain of it.

If, indeed, it had appeared that, in consequence of the delay and of the absence of protest by the defendants, the plaintiff's position had been altered, and he had thereby been induced to believe that the defendants intended to waive their right to avoid the contract of insurance, and had consequently abstained from effecting insurance elsewhere, we should probably have thought that, though

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there had been in fact no exercise by the defendants of their right of election, the case fell within the view taken in *Clough* v. *London and North Western Ry. Co.* (1), and that this question ought to have been submitted to the jury. But, in truth, although the plaintiff was examined as a witness on his own behalf, he did not assert that he was induced by the defendants' conduct to think the policy a binding one, and consequently abstained from effecting a fresh policy; and, looking at the letters that passed between the plaintiff and his brokers, set out in Appendix C. to the case (which shew that the broker could not succeed in covering the ship or freight for any amount beyond that already effected), it is impossible that any such case could have been successfully made, and we therefore think that the learned judge would have been wrong had he left any such question to the jury.

It remains only to examine the reasons given by Martin and Bramwell, BB., for granting a new trial. The letters to which we have alluded do not appear to have been brought before those learned judges, and we cannot help thinking that if their attention had been drawn to them they would probably have arrived at a different conclusion. Martin, B., treats the case as one of estoppel; but, according to a long series of cases like *Pickard* v. *Sears* (2), the estoppel would only arise on proof that the plaintiff had been prejudicially affected by a belief that the defendants were treating the contract as binding.

Bramwell, B., does not rest his judgment precisely on this ground, but it is evident that he was a good deal influenced by the belief that the defendants' silence prevented the plaintiff insuring elsewhere, which, as we have pointed out, was not the case.

The learned Baron seems to have thought that it was the duty of the defendants, within a reasonable time after discovering the concealment, to notify to the plaintiff their intention to avoid the policy, and that by not doing so, and handing out the policy without objection, they, in the absence of any evidence to explain their conduct, entitled the assured to treat it as an election not to avoid the contract. It is to be observed that he does not go to the length of saying that Blackburn, J., ought to have told the jury that the handing out of the policy without protest did, in

(1) Law Rep. 7. Ex 26. (2) 6 A. & E. 469.

point of law, amount to an affirmance of the contract, which precluded the defendants from afterwards raising the question; but that he ought to have left to them the circumstances of the case, as putting the burden of proof on the defendants to shew that the plaintiff did not understand, or had no right to understand, the conduct of the defendants as an election. For the reasons already given we think this is not so, and that, if there really was no election, it is wholly immaterial whether the plaintiff understood, or had a right to understand, the conduct of the defendants as amounting to an election, unless under that belief he altered his position.

For these reasons we think that the charge of the learned judge is not open to any of the objections made to it.

It was, however, further contended by Mr. Holker, that, though an application for a new trial on the ground of the verdict being against evidence cannot be carried to the Exchequer Chamber, it was competent to him, in supporting the judgment of the Court below, to rely on the alleged unsatisfactory character of the verdict as a reason for allowing the rule for a new trial to stand. We are, however, clearly of opinion that it is not so; sitting here as a court of appeal, we have no jurisdiction to deal with anything but matters of law, and cannot entertain the question whether the verdict be or be not unsatisfactory, or any other question of mere discretion.

The result is that the judgment of the Court of Exchequer must be reversed, and the rule for a new trial discharged.

Judgment reversed.

Attorneys for plaintiff: *Sharpe, Parker, & Co.*
Attorneys for defendants: *Thomas & Hollams.*

END OF EASTER TERM, 1873.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXVI VICTORIA.

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June 13.

GREEN *v.* BEACH.

County Court—Jurisdiction—Cause of Action—31 & 32 *Vict. c.* 142, *s.* 1—*Prohibition.*

The plaintiff and defendant dwelt and carried on business in the districts of the B. and L. county courts respectively. The plaintiff offered verbally at B. to buy of the defendant certain cotton. The defendant accepted that offer at L., signing a sold note, which he forwarded to the plaintiff at B. The cotton was to be and was delivered at L. The plaintiff alleged that there had been short delivery, and entered a plaint for damages, by leave of the registrar, in the B. county court. Upon motion for a writ of prohibition:—

Held, that the offer at B. was a part of the cause of action, and therefore, that the judge had jurisdiction under 30 & 31 Vict. c. 142, s. 1.

THE plaintiff is a cotton spinner residing and carrying on business at Blackburn within the district of the county court there. The defendant is a merchant residing and carrying on business at Liverpool. On the 5th of March the defendant's agent, who himself resides at Preston, called on the plaintiff at Blackburn, and brought under his notice several lots of cotton,

amounting to sixty-six bales, which the defendant proposed to sell. The plaintiff offered verbally $9\frac{1}{8}d.$ per pound, and the defendant's agent, on his return to Preston the same evening, telegraphed this offer to the defendant, who, after consideration, resolved to accept it, and accordingly, on the 7th of March, forwarded by post to Blackburn a sold note of the cotton, signed at Liverpool. In the same letter was inclosed a bought note, which the plaintiff signed at Blackburn, and there handed to the defendant's agent. The cotton was to be delivered at Liverpool, and was delivered there. The plaintiff alleged that the weight delivered was less than the invoice weight, and commenced proceedings by plaint in the Blackburn County Court, with the leave of the registrar, to recover damages for short delivery. Liverpool is not within the Blackburn County Court district.

Butler moved for a rule calling on the plaintiff and the judge of the Blackburn County Court to shew cause why a writ of prohibition should not issue to the judge on the ground that there was no jurisdiction. (1) In this case the cause of action arose wholly at Liverpool. It was there that the contract on which it is sought to charge the defendant was made by his signing the sold note, and there that the alleged breach was committed. Nothing occurred at Blackburn beyond the verbal offer of the plaintiff, which is no part of the cause of action: *Aris* v. *Orchard* (2); *Newcombe* v. *De Roos.* (3) The cause of action is made up of the contract and the breach, and the contract is made, not where the offer is made, but where it is accepted.

[POLLOCK, B., referred to *Borthwick* v. *Walton* (4), where a verbal order for goods was treated as a material part of the cause of action in proceedings to recover the price.]

The order in that case was the contract. Here there was no contract binding on the defendant except the sold note.

(1) The County Court Act, 1867 (30 & 31 Vict. c. 142), s. 1, enacts that a plaint may be entered in the county court within the district of which the defendant shall dwell or carry on business at the time of bringing the action or suit, or by leave of the judge or registrar, "in the county court, in the district of which the cause of action or suit wholly or in part arose."

(2) 6 H. & N. 160; 30 L. J. (Ex.) 21.

(3) 2 E. & E. 271; 29 L. J. (Q. B.) 4.

(4) 15 C. B. 501; 24 L. J. (C. P.) 83.

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KELLY, C.B. The first section of the County Court Act of 1867 enables a plaint to be entered, by leave, in the county court, in the district of which the cause of action or suit wholly or "in part" arose. Here the offer of the plaintiff was made at Blackburn within the district of the Blackburn County Court, and I think, therefore, that the cause of action arose "in part" there. The offer, though not of itself a contract, was, in my opinion, a part of the cause of action. Moreover the bought note was signed in Blackburn.

MARTIN and POLLOCK, BB., concurred.

Rule refused.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Co., for Hull, Stone, & Fletcher, Liverpool.*

June 2.

SAXBY AND ANOTHER *v.* HENNETT AND ANOTHER.

Patent—Priority in actual Sealing—Date of Application—15 & 16 *Vict. c.* 83, *s.* 24.

Two patents for the same invention were applied for on the 20th and 23rd of July, 1867, respectively. The patent applied for on the 23rd of July was actually sealed before that applied for on the 20th of July, but each patent was dated as of the day of application:—

Held, that under the 15 & 16 Vict. c. 83, s. 24, the patents took effect as upon the days on which they were applied for respectively, and therefore acts done by virtue of the patent applied for on the 23rd of July were infringements of the patent applied for on the 20th of July.

DECLARATION by John Saxby and J. S. Farmer, that the plaintiff Saxby was the true and first inventor of an invention of a certain new manufacture, that is to say: "Improvements in the mechanical contrivances and apparatus employed for locking, and for actuating or setting in motion the locking and interlocking gear used, or intended to be used, for regulating or governing the action and movement of railway points and signals in relation to each other," as the same was described in the specification amended by the disclaimer and memorandum of alteration hereinafter mentioned; that thereupon Her Majesty, by letters patent bearing date the 20th of July, 1867, granted to Saxby, his executors, &c.,

the sole privilege to make, &c., the said invention within the United Kingdom for fourteen years from the 20th of July, 1867, subject to a condition that Saxby should, within six months next after the date of the letters patent, cause to be filed in the Patent Office an instrument under seal, particularly describing the nature of the invention, and subject also to certain other conditions as to the payment of stamp duty; that Saxby fulfilled the conditions, and afterwards, by deed duly registered, assigned one-half share in the letters patent to the plaintiff Farmer; that a disclaimer and memorandum of alteration, pursuant to the statutes in such case made and provided, was duly entered and filed; and that after the assignment and disclaimer the defendants infringed the said letters patent, otherwise than in relation to the parts of the invention so disclaimed and altered [averments of plaintiffs' interest in the patent right infringed, and of damage; and claim for an injunction and account].

Plea: That one Walter Easterbrook was the true and first inventor of an invention of a certain new manufacture, that is to say, "improvements in machinery for actuating, setting in motion, locking, interlocking, and controlling railway points and signals," and thereupon Her Majesty, by letters patent bearing date the 23rd of July, 1867, granted to Easterbrook the sole privilege to make, &c., the said invention within the United Kingdom for fourteen years from the 23rd of July, 1867, subject to the condition that Easterbrook should, within six months next after the date of the letters patent, cause to be filed in the patent office an instrument under seal particularly describing the nature of the invention, and subject also to certain other conditions as to the payment of stamp duty; that Easterbrook fulfilled the conditions; that the alleged infringements were in respect of certain apparatus comprised in and according to the above-mentioned invention and letters patent, and were made and done by the defendants under the orders and superintendence of Easterbrook and on his behalf; and that the said letters patent in the declaration mentioned, bearing date the 20th of July, 1867, were granted, and the condition as to the said instrument was fulfilled at a time subsequent to the time when the said letters patent were granted to Easterbrook, and to the fulfilment by him of the aforesaid conditions by him to be performed.

Demurrer and joinder.

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The 15 & 16 Vict. c. 83 (Patent Law Amendment Act, 1852), s. 23, enacts that it shall be lawful (the Act of the 18th year of Hen. 6, c. 1, or any other Act notwithstanding) "to cause any letters patent, to be issued in pursuance of this Act, to be sealed and bear date as of the day of the application for the same . . . . or where the law officer to whom the application was referred, or the Lord Chancellor, thinks fit and directs, any such letters patent as aforesaid may be sealed and bear date as of the day of the sealing of such letters patent, or of any other day between the day of such application . . . . and the day of such sealing." Sect. 24 enacts that "any letters patent issued under this Act, sealed and bearing date as of any day prior to the day of the actual sealing thereof, shall be of the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date; provided always that, save where such letters patent are granted for any invention in respect whereof a complete specification has been deposited upon the application for the same under this Act, no proceeding at law or in equity shall be had upon such letters patent in respect of any infringement committed before the same were actually granted."

Herschell, Q.C. (*A. R. Poole* with him), in support of the demurrer. The plaintiffs' patent was actually sealed after Easterbrook's, under which the defendants justify. But the Crown cannot derogate from its own grant, and notwithstanding the terms of the Patent Law Amendment Act, 1852, ss. 23, 24, permitting patents to be antedated, it must be taken that the date of the actual granting of the patent is the date to be looked at as between rival patentees. Here Easterbrook's patent was sealed first in point of time, and the plaintiffs' patent, although when sealed it professed to be antedated, could not be antedated to the prejudice of Easterbrook: *Ex parte Bates* (1); *Ex parte Henry* (2); *Ex parte Scott.* (3) The antedating of the letters patent to the plaintiff Saxby was improvident, so far as Easterbrook's rights were concerned, and it must be taken that, as regards him, the grant was void; and, being void, it is not necessary to proceed to repeal the grant by sci. fa.

(1) Law Rep. 4 Ch. 577. (2) Law Rep. 8 Ch. 167.
(3) Law Rep. 6 Ch. 274.

Holker, Q.C. (*T. Aston, Q.C.*, and *Macrory* with him), was not called upon to argue for the plaintiffs.

KELLY, C.B. I am of opinion that the plaintiffs are entitled to our judgment. The scheme of the Patent Act (15 & 16 Vict. c. 83) is to entitle the Crown to grant letters patent to the author or first inventor of a new machine, and where two or more persons, at much about the same time, believe that they have invented the same machine, the legislature provides a mode of coming before the attorney or solicitor-general for the purpose of getting the patent sealed. The application is made by delivery either of a provisional or complete specification; and this application is advertised, together with the title of the proposed invention, and all who are interested in such matters have an opportunity of knowing about it. Notice is given by the patentee at each step, and any one interested may lodge a caveat against the grant of the patent. In this case the plaintiff Saxby's application bore date on the 20th of July; the defendant's was a few days later. He had warning of the danger which he was in, but he lodged no caveat against the sealing of Saxby's patent. Nothing was done either by Saxby or Easterbrook to prevent the patent of the other from being sealed, and eventually both were sealed, the sealing of Easterbrook's being prior in point of time. Had he objected, the Lord Chancellor, to whom in these cases an appeal from the decision of the law officers of the Crown lies, might have declined to seal Saxby's patent; but he did not object, and accordingly both patents were sealed. Now of the competency of the Crown to seal both there can be no doubt; and then the 24th section of the Patent Act comes into operation. By s. 23 the old Act of Hen. 6, forbidding the antedating of patents, is in effect repealed, and s. 24 enacts that letters patent, where antedated, are to be of the same validity as if sealed on the day they bore date. The Lord Chancellor is the judge of whether the grant shall be made, and what date it shall bear, but when once made this section operates. In this case, therefore, Saxby's patent must be taken as dated before the patent of Easterbrook, and the plaintiffs are therefore entitled to judgment.

MARTIN, B. I also think the plea is bad. Though it purports

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to be a plea of confession and avoidance it confesses nothing. It does not allege that the improvements patented by Easterbrook are the same with those patented by Saxby. It does not therefore touch the cause of action. Further, even if it did, I do not think it would be a good plea, for after once Saxby's patent was sealed any objection to its validity is not matter for plea at all, but for scire facias to repeal the grant.

POLLOCK, B. I am of the same opinion. It is contended that the decisions which have been referred to ought to lead us to a different conclusion; but I do not think that such is their effect. Easterbrook might have objected to Saxby's patent being sealed, and possibly, according to those decisions, he would have been successful. But this not having been done, when Saxby's patent is sealed it must be taken, according to the Patent Act of 1852, s. 24, as having force from the day of its being applied for.

Judgment for the plaintiffs.

Attorney for plaintiffs: *Faithfull.*
Attorneys for defendants: *Prideaux & Son.*

June 5.

HUME *v.* DRUYFF.

Debtors Act, 1869, *s.* 6—*Arrest of Defendant—Prosecution of Action—Detention after Final Judgment.*

A defendant who has been arrested and imprisoned under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6, on the ground that his absence from England will prejudice the plaintiff "in the prosecution of his action," cannot be kept in prison after final judgment has been signed.

IN this case *Thrupp* moved to discharge the defendant out of custody. He had been arrested under s. 6 of the Debtors Act, 1869, which enacts that where the plaintiff, in any action in which, if brought before the commencement of that Act, the defendant would have been liable to arrest, proves at any time before final judgment, by evidence on oath to the satisfaction of a judge, "that the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause

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for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action," such judge may order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given security not to go out of England without the leave of the Court. Final judgment had been signed for the plaintiff, and it was therefore contended that the defendant was entitled to be released: Day's Common Law Procedure Act, 4th ed., p. 407, citing *Yorkshire Engine Company* v. *Wright*. (1)

Petheram shewed cause in the first instance. Until the judgment is satisfied the action is still being prosecuted. The defendant's presence may still materially assist the plaintiff, for under the Common Law Procedure Act, 1854, s. 60, he may be examined as to debts due to him, with a view to the plaintiff's attaching them. In the case cited no reference was made to this circumstance.

Thrupp, in supporting the rule, referred to *In re Wilkins* (2), where it was held that the process of foreign attachment only authorized the detention of the debtor until final judgment.

THE COURT (Bramwell, Pigott, and Cleasby, BB.) were clearly of opinion that "the prosecution of the action" ended with final judgment, and that the defendant could not be detained in prison afterwards. They accordingly made the rule absolute.

Rule absolute.

Attorney for plaintiff: *Hoyle.*

Attorneys for defendant: *Wright & Son.*

(1) 21 W. R. 15.

(2) Law Rep. 8 Q. B. 107.

1873
June 23.

[IN THE EXCHEQUER CHAMBER.]

GARLAND *v.* JACOMB.

Bill of Exchange—Acceptance, what it admits—Estoppel—Unauthorized Indorsement by one of two Partners.

B., a member of the firm of W. & B., attorneys and solicitors, drew and indorsed for value to the plaintiff in the partnership name, a bill of exchange payable to the order of W. & B., which the defendant accepted without consideration. The indorsement was in respect of an entirely private matter of business between B. and the plaintiff, unconnected with partnership purposes; B. had no authority from W. either to draw or indorse the bill. In an action by the indorsee against the acceptor, the defendant having traversed the indorsement:—

Held, that the defendant was not estopped from shewing that there had been no indorsement in fact by the firm.

Appeal against the decision of the Court of Exchequer making absolute a rule obtained by the defendant to shew cause why a nonsuit should not be entered.

The declaration was on a bill of exchange drawn by Messrs. Williamson & Blackburn on the defendant Agnes Jacomb, requiring her to pay to their order 75*l.* three months after date, which bill was accepted by her and indorsed by Williamson & Blackburn to the plaintiff.

Plea, traversing the indorsement. Issue.

The cause was tried before Keating, J., at the Leeds Spring Assizes, 1872, when the following facts were proved:—

The firm of Williamson & Blackburn consisted, at the time of the drawing and indorsement of the bill sued on, of Edward Williamson and Arthur Blackburn, and carried on the business of attorneys and solicitors. The drawers' and indorsers' names were written by Arthur Blackburn. The transaction was not in any way connected with the partnership, but was entirely a private matter of business between Arthur Blackburn and the plaintiff, who knew that Williamson & Blackburn were a firm of attorneys, having had previous business dealings with them, and also that Arthur Blackburn had indorsed this bill in the name of the firm. There was no consideration for the acceptance of the bill by the defendant, but of this the plaintiff had no notice. Arthur Blackburn had no autho-

rity from his partner, Edward Williamson, either to draw or indorse the bill, and the latter knew nothing about the bill until after it had been so indorsed. The bill was dishonoured when it became due, and thereupon this action was brought. The learned judge, upon proof of the above facts, directed a verdict for the plaintiff for the amount of the bill, with leave to the defendant to move to enter a nonsuit on the ground that, as Arthur Blackburn had no authority from Edward Williamson to draw or indorse the bill, the allegation of the indorsement by the firm was not proved. A rule was afterwards obtained accordingly which, upon the 31st May, 1872, the Court of Exchequer (Martin, Bramwell, and Channell, BB.) made absolute. The plaintiff appealed.

May 15. *Kemplay, Q.C.* (*E. Lumley* with him), for the appealing plaintiff. The defendant by her acceptance is estopped from denying that the bill was drawn by "Williamson & Blackburn," payable to their order. Further, she is estopped from denying the then capacity of each partner to indorse in the name of the firm: in other words, seeing the firm is a non-mercantile one, she is estopped from denying that each partner had actual authority from the other.

[KEATING, J. The defendant may have admitted a capacity to indorse, and yet may deny the indorsement in fact.]

The acceptance by the defendant amounts to a representation that the bill could be indorsed by either partner for the firm, and it was so indorsed by one of them in fact. As far as the defendant was concerned, the bill was issued as drawn by the partnership, and when indorsed in the partnership name must be taken as regards her to be properly indorsed. That an acceptor admits not only the drawing, but the then capacity of the payee to indorse, is clear from *Pitt* v. *Chapelow* (1); *Braithwaite* v. *Gardiner* (2); *Taylor* v. *Croker* (3); *Jones* v. *Darch* (4); *Hallifax* v. *Lyle* (5); *Smith* v. *Marsack.* (6)

[QUAIN, J., referred to *Ashpitel* v. *Bryan* (7);) where an acceptor

(1) 8 M. & W. 616.
(2) 8 Q. B. 473.
(3) 4 Esp. 187.
(4) 4 Price, 300.
(5) 3 Ex. 446; 18 L. J. (Ex.) 197.
(6) 6 C. B. 486; 18 L. J. (C.P.) 65.
(7) 3 B. & S. 474; 32 L. J. (Q.B.) 91; S. C. in Ex. Ch. 5 B. & S. 723; 33 L. J. (Q.B.) 328.

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was not permitted to set up that the drawing and indorsement were in the name of a deceased person.

KEATING, J., referred to *Robinson* v. *Yarrow* (1), where it was held in the case of a bill drawn by procuration, that the acceptance admitted the authority to draw, but not the authority to indorse.]

The procuration might be withdrawn at any moment.

A. Wills, Q.C., contrà. *Robinson* v. *Yarrow* (1) is analogous to this case. The authority to draw a bill is one thing; the authority to indorse it another; and, in that case, the two things are treated as perfectly distinct. Here Blackburn had no authority in fact. The bill was drawn and indorsed, as the plaintiff knew, for a non-partnership purpose, and although it must be conceded that the defendant cannot deny the drawing by the firm, there is nothing to estop her from contesting the indorsement in fact. It is said that because the capacity of the firm to indorse, when the bill was drawn, is admitted, the actual indorsement must be admitted also. But the case above referred to is conclusive against that contention. There was no evidence that the defendant had any intention that Blackburn should indorse and raise money on the bill. Moreover, even if Williamson had actually authorized Blackburn to indorse the bill as if it were a bill of an ordinary trading partnership, the plaintiff would still fail, because the indorsement was for the private purposes of the indorsing partner.

Kemplay, in reply, cited *Carvick* v. *Vickery*. (2)

Cur. adv. vult.

June 23. The judgment of the COURT (Blackburn, Keating, Brett, Grove, Quain, Archibald, and Honyman, JJ.) was delivered by

BLACKBURN, J. In this case the plaintiff sued on a bill of exchange drawn by Williamson & Blackburn on the defendant payable to their order and accepted by her. It was indorsed in the name of the firm, Williamson & Blackburn. The material issue was on a traverse of the indorsement. On the trial before my Brother Keating the plaintiff had a verdict with leave to move to enter a nonsuit. A rule having been obtained accordingly,

(1) 7 Taunt. 455. (2) 2 Dougl. 653 (n).

was made absolute, and against that decision there was an appeal.

It appears from the facts stated in the case, that Williamson & Blackburn were in partnership as attorneys, and that the bill was both drawn and indorsed by Blackburn in the name of the firm, without the knowledge of Williamson, and that Blackburn had no authority from Williamson, either to draw or indorse this bill.

It is further stated in the case, and this is a very material statement, that, though Blackburn indorsed it for value to the plaintiff, this transaction was not in any way connected with the partnership, but was entirely a private matter of business between Blackburn and the plaintiff. The authority of one partner to bind the firm is thus stated by Parke, J., in *Dickenson* v. *Valpy* (1). "One partner does communicate to the other all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged." And from this it follows that where the course of dealing is such as to make it the usual course to draw and indorse bills in the name of the firm each partner has authority to do so for partnership purposes. But the business of attorneys is not such as to render it either necessary or usual to draw or indorse bills, and therefore a member of a firm of attorneys has not, as such, authority to bind his firm, either by drawing or indorsing bills; *Hedley* v. *Bainbridge* (2); and therefore Williamson could not have been made liable on this bill, either as drawer or indorser. This was not disputed, but the defendant having accepted this bill, drawn by Williamson & Blackburn, is, as against an innocent indorsee, estopped from denying that it was duly drawn by that firm. The question mainly argued was, whether from that estoppel it followed that she was also estopped from denying the indorsement made by the same partner who drew the bill.

If the defendant had accepted the bill with the intent that Blackburn should indorse the bill, and so raise money on it, it might have been a serious question whether she would not have been estopped from denying the indorsement; see *Beeman* v. *Duck* (3); but no such fact is found. And in the absence of such a fact, the acceptor (generally), though he admits the authority of the

(1) 10 B. & C. at p. 140. (2) 3 Q. B. 316. (3) 11 M. & W. 251.

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person drawing the bill to draw it, does not admit the authority of the same person to indorse it. A doubt occurred to some of us during the argument, whether, if Williamson had really assented to the bill being drawn by his partner in the firm's name, payable to the order of the firm, he would not have conclusively established as against himself that the indorsing of this particular bill was necessary for the purposes of the firm, and consequently that his partner had the same authority to indorse it as he would have had if the business of the firm required the drawing and indorsing of bills. The decision of the Court of Queen's Bench in *Lewis* v. *Reilly* (1) seems to involve in it this principle, unless it be supposed that there is a difference between surgeons and attorneys in this respect. And if this were so, the question would rise whether the defendant is not bound by her estoppel to admit this primâ facie authority to indorse. But we do not think it necessary to decide this, for, supposing it had been the fact that Williamson & Blackburn had both drawn this bill, and that Williamson had in fact given to Blackburn all the authority to indorse it which a trading firm gives to one of its partners; that would not have been an authority to indorse for a private purpose of the partner wholly unconnected with the partnership, and the plaintiff who took it in that way would not have acquired any title to the bill, unless Williamson either expressly authorized or ratified the indorsement. For the indorsement was made without actual authority, and the plaintiff when he took it knew it was beyond any apparent authority in Blackburn.

Of course the plaintiff's title against the defendant arising from an estoppel cannot be better than it would have been had everything which the defendant is estopped from denying been literally true.

We think, therefore, that the judgment below was right and should be affirmed.

Attorney for plaintiff: *Rushworth.*

Attorneys for defendant: *Chauntler, Crouch, & Spencer.*

(1) 1 Q. B. 349.

[IN THE EXCHEQUER CHAMBER.]

1873
June 26.

ROWLEY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Action under Lord Campbell's Act (9 & 10 *Vict. c.* 93)—*Value of Life of Deceased—Value of an Annuity according to Carlisle Tables—Evidence—Skilled Witness.*

At the trial of an action under 9 & 10 Vict. c. 93, brought for the benefit of the mother, widow, and children of R., claiming damages from the defendants for having by their negligence caused the death of R., it was proved that the deceased was under a covenant to pay his mother an annuity of 200*l.* during their joint lives. A witness was then called for the plaintiff who stated that he was an "accountant," and that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to certain tables used by insurance offices called the "Carlisle Tables," as to the average duration of life of two persons of the ages of the mother and son respectively, and as to the price for which an annuity for the mother's life could be bought. The admissibility of this evidence was objected to by the defendants, and was ruled to be admissible.

In summing up the learned judge directed the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what was the sum which would purchase an annuity of 200*l.* for a person of her age, according to the average duration of human life; and that in calculating the widow's and children's damages they might, if they thought proper, take as a guide the period of the probable duration of life of a person of the age of the deceased. On the argument of a bill of exceptions tendered to the ruling of the learned judge in admitting the evidence and to his direction to the jury:—

Held, first (by Blackburn, Keating, Grove, and Archibald, JJ.), that the witness was competent to give evidence as to the probable duration of life and the price of the annuity, although not an actuary; and (Brett, J., dissenting) that the evidence was relevant and properly admitted.

Secondly, by the whole Court, that the direction to the jury as to the calculation of the mother's damages was wrong.

By Blackburn, Keating, Grove, Archibald, and Honyman, JJ. The direction was erroneous in not noticing the circumstance that the annuity of the mother was on the joint lives of herself and her son, and that it was only secured by the personal covenant of her son.

By Honyman, J. The direction was also erroneous in authorizing the jury to find the term for which an annuity is to be purchased, solely by reference to the average duration of life, without taking into account the state of health of the particular annuitant.

By Brett, J. The only legal direction to the jury would have been that they ought not to attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they considered, under all the circumstances, a fair compensation; and the direction was therefore erroneous, inasmuch as it left it open to the jury to

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give as damages the utmost amount which they might think was an equivalent for the pecuniary mischief done.

Thirdly (by Blackburn, Keating, Grove, and Archibald, JJ., Brett, J., dissenting), that the direction as to the mode of calculating the damages recoverable by the widow and children might be construed as meaning that the probable duration of life of a person of the same age, and in the same circumstances as the deceased, was an element to be taken into the calculation of the jury with the rest of the evidence, and being so construed was correct.

BILL OF EXCEPTIONS.

Declaration (under 9 & 10 Vict. c. 93, ss. 1, 2) by the executrix of J. C. Rowley, against the defendants for negligence causing his death, claiming damages on behalf of the mother of the deceased, of herself as his wife, and of his six children.

Plea, not guilty. Issue.

The cause was tried at the Manchester Summer Assizes, 1871, before Kelly, C.B. The negligence was admitted by the defendants, and the question became one of an assessment of damages, as to which the following facts were proved:—

The deceased was an attorney at Manchester, and by articles of partnership, dated in the year 1853, between his father and himself, he covenanted that he would during the joint lives of himself and his mother, pay her an annuity of 200*l.* He was forty years old at the time of his death, and his mother was then aged sixty-one. Under these circumstances one John Adamson, an accountant, was called, who after having given evidence as to the income of the deceased, was asked whether he was acquainted with the business of life insurance. He said that he was, and after referring, with the leave of the learned judge, to certain tables which he had with him, called the Carlisle Tables, and which purport to shew the average duration of human lives, and on which insurance companies are in the habit of relying, deposed that according to those tables the average duration of the life of two persons aged forty and sixty-one respectively, is 27·6 years and 13·82 years; and that the sum of money which would purchase an annuity of 200*l.* for the life of a person of sixty-one years old is 2000*l.*

The counsel for the defendants having objected to the admissibility of this evidence, the learned judge ruled that "the evidence so given by Adamson as to the average and probable duration of the life of a person of the age of forty years, and as to the average

and probable duration of the life of a person of the age of sixty-one years, was admissible."

In summing up, the learned judge told the jury that "they might if they thought proper calculate the damages which the mother of the deceased was entitled to recover, by ascertaining what is the sum of money which would purchase an annuity of 200*l.* for a person sixty-one years of age, according to the average duration of human life; that according to the Carlisle Tables it had been stated that the average duration of the life of a man in good health and vigour, who had arrived at the age of forty years, is twenty-seven years and a fraction; and that they might, if they thought proper, take as a guide in their calculations of the damages recoverable for the wife and children that such was, according to these tables, the probable duration of the life of a man of forty years of age, in the circumstances in which the deceased was." The defendants' counsel excepted to the ruling of the learned judge as to the admissibility of the above evidence; and also to his direction to the jury, in the following terms: "That by law the learned Chief Baron ought not to have directed the jury that they might if they thought proper calculate the damages which the mother of the deceased was entitled to recover by ascertaining what is the sum of money which would purchase an annuity of 200*l.* a year for a person of sixty-one years of age, according to the average duration of human life, and that they might, if they thought proper, take as a guide in their calculation of the damages recoverable for the wife and children of the deceased that the probable duration of the life of a man of forty years in the circumstances in which the deceased was is twenty-seven years, according to the Carlisle Tables." The jury assessed the damages at 6200*l.*, apportioning 1200*l.* to the mother, 1400*l.* to the wife, and 600*l.* to each of the children.

May 19. *Holker*, *Q.C.* (*Part* with him), for the defendants. First: The witness Adamson was not "skilled." He was not an actuary, but simply gave the results of the Carlisle Tables; results which he himself had not verified. Such evidence is not admissible at all: *Carter* v. *Boehm* (1); Taylor on Evidence, 6th ed.

(1) 1 Sm. L. C. 6th ed. 490.

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vol. ii., p. 1228. The witness, it is true, stated he was acquainted with life assurance business, but that is not sufficient. Knowledge of a subject, however ample, unless it is professional, does not entitle a witness to speak to matters of opinion. Thus a layman, though he may be learned, cannot be heard to expound the law: *Sussex Peerage Case* (1), overruling the opinion of Wightman, J., in *Reg.* v. *Dent.* (2) But assuming the witness was sufficiently skilled, the evidence ought not to have been admitted. The knowledge of the price of an annuity for the mother's life, or for the joint lives of mother and son, was almost certain to mislead the jury, and was not a proper element to be introduced into their calculation of damages.

Secondly: The direction as to the mode of calculating the mother's interest is obviously wrong. She was not entitled to the value of an annuity of 200*l.* for her own life, but only for the joint lives of herself and her son.

Thirdly: No qualification was suggested as to the nature of the particular life. The tables are calculated on the lives of persons in ordinary health and vigour. Here there was nothing to shew that the deceased's was an average life.

Lastly: The learned judge was wrong in telling the jury to take the value of an annuity according to the tables as a guide. These tables refer to an annuity secured by the Government. In this case it was secured simply by the personal covenant of the deceased. The proper direction would have been that the jury must take a reasonable view of the case and give a fair compensation, and not consider the value of the deceased's existence as if they were bargaining with an insurance office. Such was in substance the direction of Parke. J., in *Armsworth* v. *South Eastern Ry. Co.* (3), which is referred to without disapproval in *Blake* v. *Midland Ry. Co.* (4); although in the latter case evidence of the value of an annuity was given.

Edwards (*Grundy* with him) for the plaintiff. The witness Adamson stated that he was "acquainted with the business of life insurance." He was, therefore, "skilled." There is no regular profession of actuaries in such a sense as to exclude the evidence

(1) 11 Cl. & F. at p. 134.
(2) 1 C. & K. 97.
(3) 11 Jur. 758.
(4) 18 Q. B. 93; 21 L. J. (Q.B.) 233.

of any witness conversant with the probabilities of the duration of life. With regard to his reference to the Carlisle Tables, that is unobjectionable. A mathematician might in the same manner refer to a table of logarithms, although without a separate calculation he would find it impossible to say what the logarithm of a particular number was. The tables in each case are the recognised results of scientific research.

[BLACKBURN, J. In *Rickards* v. *Murdock* (1) Lord Tenterden, C.J., says, with regard to the admission in evidence of the opinion of underwriters as to the materiality of certain matters which had not been communicated by the assured to an insurance company (at p. 540): "I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject matter of the inquiry."]

The witness swore that he was "conversant with the matter" as to which he spoke.

Again, the evidence as to the present value of an annuity is admissible. Similar evidence was given in *Blake* v. *Midland Ry. Co.* (2) See also Redfield on Carriers, p. 298. A mistake was no doubt made by all parties as to the calculation of the annuity on the mother's life alone, but the exception is not addressed to that point. As to the lives being taken as average lives, if the defendants desired to have them otherwise taken, they should have given evidence of their being defective.

Holker, Q.C., in reply.

Cur. adv. vult.

June 26. The following judgments were delivered:—

BLACKBURN, J. In this case the plaintiff, as executrix of James Campbell Rowley, sued the defendants under Lord Campbell's Act, for the benefit of the mother, wife, and children of the deceased, for negligence occasioning the death of the deceased.

It appears by the bill of exceptions that the mother was entitled to an annuity of 200*l.* a year during the joint lives of herself and the deceased, secured by the personal covenant of the deceased, who was an attorney practising at Manchester, and that at the

(1) 10 B. & C. 527. (2) 18 Q. B. 93; 21 L. J. (Q.B.) 233.

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time of his death he was forty years of age, and the mother sixty-one. It does not appear, on the bill of exceptions, that any evidence was given as to the state of health of either the deceased or his mother. Nor does it appear, on the bill of exceptions, whether any and what evidence was given as to the means of the deceased. It is clear on this statement that, as the mother had actually lost the annuity of 200*l.* a year, it was material to ascertain what was the value of that annuity; a question which must, in addition to other contingencies, depend upon the probable duration of the lives of the mother and her son.

Now, with the view of ascertaining the probable duration of a particular life at a given age, it is material to know what is the average duration of the life of a person of that age. The particular life on which an annuity is secured may be unusually healthy, in which case the value of the annuity would be greater than the average; or it may be unusually bad, in which case the value would be less than the average; but it must be material to know what, according to experience of insurance companies, the value of an annuity secured on an average life of that age would be. In the present case, with a view of enabling the jury to estimate the value of the annuity, a witness was called who stated that he was an accountant, acquainted with the business of insurance companies, and who referred to the Carlisle Tables, to which, he said, life insurance companies referred for obtaining information as to the average duration of lives. He gave evidence that, according to those tables, the average and probable duration of a life of forty years is 27·6, and that of a life of sixty-one is 13·82 years; and that the sum which would purchase an annuity of 200*l.* on the life of a person of sixty-one years is 2000*l.* It is observable that as the mother's annuity was for the joint lives of herself and son, not for her own life, this last question was not relevant, but that seems to have escaped notice.

The first exception is as to the reception of this evidence. We think the average and probable duration of a life of that age was material, and we do not see how that could be better shewn than by proving the practice of life insurance companies, who learn it by experience. It was objected that the witness was not an actuary, but only an accountant, but as he gave evidence that he was expe-

rienced in the business of life insurance, we think his evidence was admissible, though subject to remarks on its weight. We therefore think that the first exception cannot be maintained.

The next exception is to the judge's direction to the jury, "that they might, if they thought proper, calculate the damages which the said mother of the deceased was entitled to recover by ascertaining what is the sum which would purchase an annuity of 200*l.* a year, for a person sixty-one years of age, according to the average duration of human life." As the mother had lost an annuity for the joint lives of herself, aged sixty-one, and her son, aged forty, secured only by his personal covenant, it seems unobjectionable to direct the jury that they might estimate the damages to her by calculating what sum would buy her an equally good annuity. But three errors are pointed out in the direction given; First, that she had lost an annuity for the joint lives of herself and son, and that an annuity for her own life only would be of considerably greater value. Second, that the value of an annuity, according to the evidence given, would be that of an annuity on an average life, and that the jury ought to have been told to make an allowance for any defect in the health of the life. Third, that the value of the annuity spoken to in the evidence was the value of an annuity on Government or other very good security, and that the annuity lost was that secured by the personal covenant of the deceased, and therefore of much less value.

We think that as far as the second of these objections is concerned, the jury might properly be directed to consider the lives in question as average lives, unless there was some evidence to the contrary; and if there was evidence to the contrary, the party excepting ought to have placed it on the bill of exceptions.

But the first and third of these exceptions seem well founded. The mistake in the first is so obvious when attention is called to it, that we can but suppose it to have been a slip, which would have been corrected at once if it had been pointed out; and if we could suppose that the counsel for the defendant had lain by to take advantage of such a slip, we would not permit them to do so. But though the error occurred in taking the evidence of the witness, and again in the summing up, it seems to have escaped the notice of every one, as well of the counsel for the defendant as of the

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judge and of the counsel for the plaintiff; and though the counsel excepting to the charge of a judge is bound to point out to him what it is he asserts is wrong, in order that the judge may, if he thinks fit, withdraw or correct his direction in that respect, he is not bound to tell the judge what he conceives is right, and indeed it would, in many cases, be unbecoming to do so. On the third of these objections, it is true that there might have been evidence that the circumstances of the deceased were such that an annuity secured by his personal covenant only was quite as good as a Government annuity. But this is not what is ordinary and usual, and if there was evidence of that sort, the plaintiff should have taken care to insert it on the bill of exceptions.

There is a further exception to the direction, "that the jury might, if they thought proper, take as a guide in the calculation of the damages recoverable for the wife and children of the deceased, that the probable duration of the life of a man of forty years of age, in the circumstances in which the deceased was, is twenty-seven years, according to the said Carlisle Tables." We think this cannot be construed as meaning more than that this was an element to be taken into calculation by the jury with the rest of the evidence; and if so, it was unexceptionable. But there is one good exception. And we think, therefore, that there must be in this case a venire de novo.

In this judgment my Brothers Keating, Grove, and Archibald concur. My Brothers Brett and Honyman also agree that there must be a venire de novo, but will deliver their reasons separately.

BRETT, J. In this case it seems to me that the bill of exceptions does not properly raise the point whether the evidence of the witness Adamson ought to have been rejected on the ground that he was not such a skilled witness as could properly be admitted to give evidence on the question of science proposed to him. Nor does it properly raise the point whether the subject matter of the question was a matter of science or of opinion. The objections stated to have been made are not that the witness was not a proper witness to give the proposed evidence, or that the proposed evidence was not a question of science, but that the evidence given by the witness was not admissible in this case. The objection taken at

the trial, and insisted upon in the exception, seems to me to be, that even if the evidence were, or assuming it to be, given by a properly competent witness, on a proper subject matter for skilled evidence, yet it was not admissible because it was immaterial. It becomes therefore unnecessary, as it seems to me, to decide whether Adamson, an accountant, was such a witness as could properly be allowed to give evidence on a matter which, if it be matter of science, is so in and according to the business of actuaries. It is sufficient to say, that having regard to what was said by Pollock, C.B., and by Alderson and Rolfe, BB., in *Bristow* v. *Sequeville* (1), I think it doubtful whether he was a competent witness.

The bill of exceptions seems to me to raise properly the question whether the evidence was rightly admitted as relevant, or ought to have been rejected as immaterial. The bill of exceptions also seems to me to raise the question, by way of alleged misdirection, whether in this class of cases a jury is entitled to assess as damages a sum of money equal to the present price or value of such an annuity as would give for the probable duration of the life of the person on whose behalf the action is brought, or of the deceased, or their joint lives, an annual income equal, or nearly equal, to the income which was enjoyed by the person on whose behalf the action is brought before and at the time of the death, or would have been enjoyed by such person during the life of the deceased. Disregarding the oversight common to all parties at the trial as to the annuity to the mother being dependent on the son's life, as well as on the mother's, and even disregarding the omission to point out the many contingencies which might have rendered the son unable to pay the annuity, even if he had lived, it seems to me that the Lord Chief Baron did leave it open to the jury to suppose that they might properly assess as the proper damages a sum of money which would be the present price or value of an annuity which would give to the mother an annual income equal to that she would have received from her son for the probable duration of time during which the covenanted annuity would have been paid to her if her son had not been killed. That is, in other words, to hold that the damages in such cases may be "the fully calculated equivalent of the pecuniary loss sustained by the person on whose

(1) 5 Ex. 275; 19 L.J. (Ex.) 289.

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behalf the action is brought." Both questions—namely, that as to the admission of evidence and that as to the direction to be given to the jury, are of the greatest practical importance. If such evidence may be given, it seems to me impossible to say that juries may not, and impossible to suppose that they will not, in many instances act upon it. If juries do give such damages, poor defendants will be ruined, and the defendants most liable to such actions will not be able to carry on their business upon the same terms to the public as now.

With regard to the alleged misdirection,—when Lord Campbell's Act (9 & 10 Vict. c. 93) was passed it was thought for a short time by some that damages might be given "to the full extent of a perfect compensation." Such was, in substance, the direction of Parke, J., in *Blake* v. *The Midland Ry. Co.* (1) The jury were invited, or it was left open to them, to give an annuity equal to the money loss and further damages by way of consolation. It was held that there must be a new trial on the ground of misdirection. The only point judicially decided was, that the statute gave a right to damages only in respect of pecuniary injury. The case did not determine what was the right rule as to the amount of damages for the pecuniary injury. But in the argument was cited, and certainly without disapproval from the Court, the direction of Parke, J., in the case of *Armsworth* v. *South Eastern Ry. Co.* (2) That direction is no doubt partly pointed to the question of damages by way of consolation, but it lays down propositions also as to the amount of damages which should be given. "It would be most unjust," it is said, "if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done." And again, "Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life. . . . You are not to consider the value of existence as if you were bargaining with an annuity office. . . . . I advise you to take a reasonable view of the case, and give what you consider a fair compensation."

This seems to be in accordance with the general rule, that in actions for tort for personal injury the amount of damages is

(1) 18 Q.B. 93; 21 L. J. (Q.B.) 233. (2) 11 Jur. 758.

entirely in the disposition of the jury subject to supervision by the superior court of law, if unreasonably large or unreasonably inadequate. To the best of my belief, the invariable direction to juries, from the time of the cases I have cited until now, has been "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation.*" I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be unjust. Founding my opinion on that conviction, on the declaration of it by Parke, J., and on the ordinary directions of judges, which directions have not been for years challenged, I conclude that the direction that I have enunciated is the legal, and only legal, direction. A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law. And such, in my opinion, was the direction in the present case of the Lord Chief Baron. If it be wrong in a jury to give an amount founded on a calculation of the present value of an annuity, any evidence given solely for the purpose of enabling a jury to make such a calculation seems to me to be necessarily misleading and legally irrelevant. It is irrelevant to any decision to which the jury ought to come. It is, in the words of Lord Mansfield in *Carter* v. *Boehm* (1), "evidence to which the jury ought not to pay the least regard." Such is and must be irrelevant, and therefore is not evidence. It seems to me that the evidence in this case, which was given and received notwithstanding objection taken to it, and to which reception the first exception is pointed, was given solely for the purpose of inviting the jury to found upon it a calculation of the price of an annuity, a calculation upon which they were not legally entitled to enter.

(1) 1 Sm. L. C. 6th ed. 490.

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I think, therefore, that the evidence was improperly admitted. And I am of opinion that upon both exceptions the defendants are entitled to judgment, and that there ought to be a venire de novo.

HONYMAN, J. (1) I agree with the rest of the Court that in this case there must be a venire de novo.

It seems to me that the language used by the Lord Chief Baron in his summing up with reference to the damages recoverable by the mother amounted substantially to a direction to the jury that they might, if they thought fit, find the amount payable to the mother by ascertaining merely the amount required for the purchase of an annuity for a person of the age of the mother, according to the average duration of the life of persons of that age. Without relying on the evident slip (common apparently to all parties) of omitting to notice that the annuity payable to his mother by the deceased was not an annuity for her life, but only for the joint lives of the two, I think that this direction is objectionable on two grounds: first, as authorizing the jury to find the term for which an annuity is to be purchased solely by reference to the average duration of human life, without taking into account the state of health and condition of the mother, and, secondly, in allowing the jury to disregard the admitted fact that the annuity which the mother had lost by the defendant's negligence was secured only by the personal covenant of a professional man, and would, therefore, become practically valueless by the inability of the grantor, through ill-health or the loss of business, to keep up the annuity payments.

Having come to the conclusion that on this ground there must be a venire de novo, I purposely abstain from expressing any opinion on the other exceptions to the Lord Chief Baron's ruling, and to the admissibility of Mr. Adamson's evidence.

Venire de novo.

Attorney for plaintiff: *Roberts.*

Attorneys for defendants: *Beale, Marigold, & Beale.*

(1) This judgment was read by Brett, J.

SOLICITOR-GENERAL *v.* LAW REVERSIONARY INTEREST SOCIETY.

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June 10.

Succession Duty—Alienation—Corporation—16 & 17 *Vict. c.* 51, *ss.* 2, 15, 27.

In 1839 S. devised land to T. for life, with remainder (subject to limitations which failed) to W. in fee. During T.'s lifetime W. sold his remainder in fee to the defendants, a corporate society, and died. On the death of T. in 1872, the defendants entered into possession. W. was a cousin of the testatrix. On an information filed by the Crown:—

Held, that the defendants must pay duty at the rate of 5*l.* per cent on the principal value of the property (s. 27).

Semble, where a succession is alienated and falls into possession after the death of the alienor, duty is payable under s. 15 of the Succession Duty Act, 1853, at the same rate as if no alienation had been made, and the alienor had survived the falling into possession.

4 Ch D 812
4 Dig Cas
436

INFORMATION at the suit of the Solicitor-General (the Attorney-General being a director in the defendants' society) to recover succession duty under the following circumstances.

Deborah Smith Dermer, by her will, dated the 20th of March, 1839, devised certain land to trustees, their heirs and assigns, upon trust for Thomas Dermer for life, and after his death (subject to certain trusts for the children of T. Dermer, which failed) upon trust for William Dermer, his heirs and assigns.

The testatrix died in 1841, without having altered or revoked her will, leaving Thomas and William Dermer both surviving.

On the 26th of October, 1864, William Dermer, by a deed in which certain mortgagees of the property concurred, mortgaged to the defendants the land so devised to him, with a proviso for redemption on payment, within six months of the death of the said T. Dermer, if he should die without leaving any child him surviving, of the sum of 11,431*l.*, with interest at 5 per cent. from the death of T. Dermer.

On the 10th of December, 1868, W. Dermer, for 850*l.*, conveyed to trustees for the defendants, his equity of redemption in the property.

W. Dermer died on the 5th of August, 1870, and T. Dermer died on the 14th of August, 1872, without ever having had a child.

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On the death of T. Dermer, the defendants entered into possession of the devised land, except certain portions which had been taken under compulsory powers by the Great Eastern Railway Company in 1870 and 1871: and obtained an order from the Court of Chancery for sale of the stock in which, under orders of the Court the purchase-money of the land so taken had been invested, and for the payment to them of the proceeds, and of the apportioned part of the dividends accruing due at the time of T. Dermer's death, without prejudice to the claim of succession duty.

W. Dermer was a cousin of the testatrix, and the Crown therefore claimed succession duty at the rate of 5*l.* per cent. on the principal value of the land, and on the principal value of the stock at the time of the death of T. Dermer.

The defendants, who were originally incorporated under 8 Vict. c. 110, and afterwards registered under the Companies Act, 1862 (25 & 26 Vict. c. 79), denied their liability to succession duty.

May 30. *Sir G. Jessel, Q.C., S.G.*, and *W. W. Karslake*, for the Crown.

Where a succession is alienated, the alienee becomes the successor under s. 2, and but for s. 15 would be liable to pay duty according to his relationship to the predecessor. By the provisions of the latter section, however, the same duty is to be paid (that is, duty at the same rate) as if there had been no alienation; this must mean, either, the same duty as would have been payable if the alienor had lived, or the same as would have been payable if the alienor had died and the property had passed to his heir; in either case the duty here will be at least 5 per cent. The former is the true construction; at least it is the one least burdensome to the subject, and the Crown is willing to adopt it. But if the latter is adopted the inquiry as to who is W. Dermer's heir must be referred to the Queen's Remembrancer. It only remains to determine the amount of the duty, and that is fixed by s. 27, which provides that where "any body corporate, company, or society shall become entitled as successors to any real property the duty in respect thereof shall be assessed upon the principal value of such property, but shall be payable by such instalments, at such times,

and in such manner as the same would be payable if assessed in respect of property devolving on a successor in fee simple."

Sir J. B. Karslake, Q.C., Joshua Williams, Q.C., and *Gates,* for the defendants. The fallacy in the argument for the Crown is in assuming that an alienee of a succession is a successor. The successor is the person who takes "by reason" of the disposition which creates the succession, that is, the person who takes directly under the limitations contained in the original disposition. That this is the meaning of s. 2 is clear from s. 20, which speaks of "the successor, or any person in his right or on his behalf" becoming entitled in possession, and from s. 44, which provides for the liability of certain other persons "besides the successor," and includes among those other persons, "every person in whom the property shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession." For the same reason the defendants are not "successors" within s. 27; that section only regulates the amount payable by persons on whom a liability is imposed by s. 2, or, if its words are in themselves capable of imposing a liability they, like the words of s. 2, apply only to persons who take directly under the disposition which creates the succession. Neither are the defendants within s. 15, which is evidently limited to the case of the alienor surviving the falling into possession. It is only in that event that it is possible to estimate the duty "as if no alienation had been made;" for it can hardly have been intended that an inquiry should be made for the heir of the alienor when neither the alienor nor his heir have any longer anything to do with the property. The case, therefore, of the alienor dying before the property falls into possession is a casus omissus, and no duty is payable. But if any duty is payable in such a case it must be on the footing of the alienor having died intestate; otherwise a new clause would have to be imported into s. 15, and the section must be read as if the words were "in case no such alienation had been made and the alienor had survived the vesting in possession;" but it lies upon the Crown to shew who the heir of the alienor is, and on this point there is no evidence before the Court. Again, assuming that duty is payable on this footing and that the heir of the alienor were discovered,

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then by s. 15 the same duty is to be paid as he would have paid on the devolution to him, and the amount must be calculated, under s. 21, upon his life. Otherwise, since by s. 44 the successor remains liable to the payment of the duty, the alienor might become liable to pay a larger amount than if he had not alienated. [They referred to *Attorney-General* v. *Cecil* (1); *Attorney-General* v. *Upton* (2); *Attorney-General* v. *Lord Braybrooke* (3); *Attorney-General* v. *Littledale.* (4)]

4 Ch D 642

Sir G. Jessel, Q.C., S.G., in reply. However many dispositions there are by virtue of which the property is taken, if one of them creates a succession, duty is payable. Property which has once been a succession does not cease to be a succession; the duty having once attached continues to be payable, and it attaches as soon as the succession exists, though only in expectancy: *Wilcox* v. *Smith.* (5)

[KELLY, C.B. If there had been no alienation, and W. Dermer's heir had taken, would he have been a successor? And, if so, what duty would he have paid?]

He would have been a successor within s. 2, and either there would be a double succession, or, if the property were personal, he would, under s. 14, have paid at least as much as W. Dermer, and, if more distant, would have paid at a higher rate. The 15th section does not itself impose a duty, but only regulates the duty which is imposed by s. 2.: *Attorney-General* v. *Littledale.* (4). This shews that the alienee is a successor, or at least the taker of a succession, within s. 2. But the rate having been fixed by s. 15, it still remains to fix the amount, for rate in that section means the same as rate in s. 10, that is, the percentage of the duty. The amount is fixed by ss. 21, 27, and the latter section is the one applicable to the present case.

Cur. adv. vult.

June 10. The judgment of the Court (Kelly, C.B., Cleasby and Pollock, BB.), was delivered by

CLEASBY, B. In this case the facts may be stated as follows,

3 Jur NS 741

(1) Law Rep. 5 Ex. 263.
(2) Law Rep. 1 Ex. 224.
(3) 6 H. L. C. 150; 31 L. J. (Ex.) 177.
(4) Law Rep. 5 Ex. 275.
(5) 4 Drew. 40; 26 L. J. (Ch.) 596.

3 Jur NS 664

for the purpose of raising the question which has been argued before us:

In 1839 one Deborah Smith Dermer, by her will, devised certain estates to Thomas Dermer for life, and after his death to William Dermer in fee. She died on the 9th of January, 1841, leaving both William Dermer and Thomas Dermer surviving. The defendants afterwards, and during the lifetime of Thomas Dermer, became the purchasers of the reversion in fee from William Dermer. William Dermer died on the 5th of August, 1870, and afterwards, on the 14th of August, 1872, Thomas, the tenant for life, died. The defendants, upon the death of Thomas, became seised in fee in possession.

William Dermer was a cousin of the testatrix, and if he had succeeded to the enjoyment of the property, would have been liable under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), to succession duty calculated in the usual way at the rate of 5 per cent.

The question is, what succession duty, if any, the defendants ought to pay.

It was contended for the Crown that the defendants were liable to pay at the same rate as William Dermer, viz., 5 per cent., and that, as they were a corporation, the amount must be calculated in the manner pointed out by s. 27 of the Act; that is to say, upon the principal value of the property.

It was contended for the defendants that as William Dermer, the devisee of the reversion, never came to the actual enjoyment of it, but conveyed away to the defendants before doing so, and died before the tenant for life, either no succession duty became payable upon the death of Thomas, or at all events only such a sum as the heir of William, if he had succeeded, would have been liable to pay.

Upon consideration of the various sections of the Act, the following conclusion seems clearly established:

First. By the operation of s. 2 (which embodies the whole principle of the Act) every person who, by reason of any disposition of property now becomes entitled to any beneficial interest after the death of another, has conferred upon him a succession, that is, according to the interpretation clause (s. 1), "property chargeable with duty under the Act."

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Secondly. Though the title to the succession dates from the disposition, and there is never any title to the property free from the duty, yet the duty is not payable until the person taking under the disposition comes to the actual enjoyment of the property; out of which enjoyment it is supposed the payment will be made.

Thirdly. If the interest taken under the disposition comes to an end before the enjoyment commences, as in the case of successive tenancies for life, when the later life dies before the earlier one the liability to duty ceases along with the interest; in other words, the duty never becomes payable.

Fourthly. The amount of duty is calculated upon the enjoyment of the property which the person actually taking is expected to have; for example, in the case of a person taking in fee, it is made upon the probable duration of the life of the person taking. And this is only reasonable; because a fresh duty will be payable at his death, and the interval will be longer or shorter according to his age. It is also payable by eight instalments, the first at the expiration of one year from his coming into possession (s. 21), so as to enable him to pay it out of his enjoyment.

But in the case of a corporation taking in fee, though the duty is still payable by instalments, their life is supposed to be permanent, and, as there can be no further succession, the amount is collected upon the principal value of the property (s. 27).

4 Ch D 812

Fifthly. If the person has had a succession conferred upon him, he cannot by parting with it prevent it from being a succession; that is, prevent it from being property liable to the duty. It continues a succession, and will be when the proper time comes a succession enjoyed in possession, into whatever hands it has come.

All the conclusions previous to the 5th are little more than statements of the nature of a succession, and of the enactments, or are such clear inferences as to need no further observations. And

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we think the fifth is an inevitable inference from the nature of a succession, from the language of the second part of the 15th section, and from the absurd consequences which would follow from holding the contrary.

The succession (created by the 2nd section) being property liable to duty, the charge imposed is not upon the person (until it becomes payable) but upon the property, and must go with it unless there

is something in the Act to remove it, which there is not. The language of the 2nd section does not deal at all with the position of the alienee of a succession, and therefore all the argument addressed to us upon the words "by reason whereof," not covering an alienee who took by reason of his conveyance, was inapplicable. The position of an alienee is a matter of legal consequence from the 2nd section, and not touched by the words of it.

Again, the second part of the 15th section provides for the mode of paying the succession duty in the case of alienation. It assumes, therefore, that the charge continues. But it was argued that the second part of the 15th section would have been applicable if William Dermer had outlived Thomas, but is not applicable if the remainderman dies before the tenant for life.

We think there is nothing in the words to warrant this limitation of meaning, and that it is a most unreasonable construction. For the absurd consequence would follow, that if there was no alienation, a duty would be payable on the death of the tenant for life, whether the remainderman died before him or not; but if there is an alienation, no duty would be payable in one event, and thus a man would have the power by alienation to relieve the property from a charge imposed for public purposes.

We have been induced to consider more fully than might seem to be necessary the question of the property being chargeable upon the death of the tenant for life, because it was made the subject of a serious argument before us, and is a matter of general application, involving a charge upon the subject.

The other questions which remain, and which were more arguable, were, first, the rate and percentage under s. 10 at which the duty was payable by the effect of the second part of the 15th section; and, secondly, the manner in which the amount should be calculated, the defendants being a corporation and taking as alienees after the death of tenant for life, and not taking directly under the instrument.

With respect to the rate of duty, it is provided for by the second part of the 15th section; but the language is susceptible of two meanings. The rate is to be the same "as if no such alienation had been made." Does this mean the same rate as the alienor would have been liable to pay, or are we to trace the course

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of events, and find what would have been the position of the successor at the death of the tenant for life.

If the remainderman outlived the tenant for life, there would be no difficulty; but if he died before, then it would be necessary to find out who would have been his heir, and thus, from his relationship to the predecessor, get at the rate of duty under s. 10.

It was said by the learned Solicitor-General, that the rate payable by the alienor himself would almost always be less, or at all events not greater than the rate payable by his heir, and that the Crown was content to adopt the construction which in general imposes the lower duty.

And this would be in conformity with the general rule, that if two constructions are open, and no preponderating reason in favour of either as a matter of construction, then the construction should be taken which imposed the lighter burden. It may be that, taken literally, the words would rather point to the real position of things at the death of the tenant for life; but still it is not an unreasonable construction, that the time of the alienation should fix the rate, because from that time the alienor has no connection with the property, and his history is unimportant.

The words "as if no alienation had been made," may thus be read as equivalent to "as if the alienor had succeeded and had to pay the duty." It should be borne in mind that the interval between the alienation and the death of the tenant for life may be the period of a long life; and although the person entitled to succeed would be able to trace his own pedigree, and then shew what duty he had to pay, it never could have been intended that the crown, in order to entitle itself to the duty, should be compelled to trace the history and descendants of a person wholly unconnected with the property, of whom it may not be known whether he be dead or alive, or in what quarter of the world he died, or what relations he had. It is much more rational to hold that, from the time of alienation, the life or death of the alienor is immaterial, and that the duty must be paid as if he succeeded. We should be ready to adopt this construction; but for the decision of the present case it is enough to say, that the Crown at all events make out a primâ facie case to be paid the duty which would be payable by the alienor, as they need not prove the death of the

alienor, and that if events have happened by which the duty would be less, the defendants must prove them.

The rate of duty, then, is 5 per cent.

As to the mode of calculating it we think there is no difficulty.

The defendants take a succession. In the words of the second part of the 15th section, "the succession has been vested in them by alienation." They are a corporation, and, within the words of the 27th section, they have become entitled as successors to the property.

It is quite true the words of this section would exactly meet the case of a corporation taking not as alienees, but directly by reason of the disposition. But, as it is obvious from the 15th section that persons who take as alienees also take as successors within the Act, so, when the 27th section uses the words "where any body corporate shall become entitled as successors," it covers the case of their becoming entitled to the succession by alienation, as well as directly by reason of the disposition.

We think the words, properly considered with reference to the subject matter, ought to receive this construction, independent of the strong objection to any conclusion which would enable a corporation to acquire a succession to real property discharged from the full burden which it would have to bear, though in a different manner, if in the hands of the alienor or of individual alienees.

The words of the Act must have been very different to compel us to hold that the present case is a casus omissus out of the Act. For the above reasons we think that the Crown is entitled to a decree upon this information, and that the defendants must pay succession duty at the rate of 5 per cent. upon the full value.

Attorney for the Crown: *Solicitor of Inland Revenue.*

Attorneys for defendants: *Capron, Dalton, & Hitchins.*

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June 26.

[IN THE EXCHEQUER CHAMBER.]

DUNCAN AND ANOTHER *v.* HILL.

THE SAME *v.* BEESON.

Principal and Agent—Indemnity of Agents—Stock Exchange Usage—Defaulting Broker.

SCh 923. 18 E 188

The plaintiffs, brokers on the London Stock Exchange, bought for the defendant (who was not a member of the Stock Exchange) certain shares for the account of the 15th of July, 1870, and on that day, by his instructions, carried them over to the account of the 29th of July, and paid differences amounting to 1688*l.* The defendant and various others, principals of the plaintiffs, not having paid the amount due from them in respect of contracts for the 15th of July, the plaintiffs became defaulters, and on the 18th, in conformity with the rules of the Stock Exchange, they were declared defaulters, and their transactions were closed, and accounts were made up at the prices current on that day. On the closing of the accounts a further sum became due from them in respect of differences upon the contracts carried over by them for the defendant. In an action to recover this sum and the 1688*l.* :—

Held (reversing the decision of the Court below), that the defendant was not liable for anything beyond the 1688*l.*, there being no implied promise by a principal to his agent to indemnify him for loss caused, not by reason of his having entered into the contracts which he was authorized to enter into by the principal, but by reason of his own insolvency.

APPEALS in two actions involving the same question.

In the first, *Duncan* v. *Hill* (1), the appeal was against the judgment of the Court of Exchequer discharging a rule to enter a nonsuit, or to reduce the damages to 1688*l.* 19*s.*, which had been obtained on the ground that the further damages claimed were not damages recoverable against the defendant, and that in that respect the plaintiffs were not legally damnified or entitled to indemnification, or otherwise to recover in the action.

The plaintiffs were stockbrokers who had been employed by the defendant to buy and sell shares for him upon the Stock Exchange. In 1870 they bought for the defendant large quantities of stocks and shares for the 15th of July, and on that day, by the defendant's instructions, carried them over to the next account day (29th of July), paying differences amounting to 1688*l.* 19*s.* On the 18th of July the plaintiffs, being unable to meet their engagements, by reason of various persons for whom they had effected contracts

(1) Reported Law Rep. 6 Ex. 255, where the pleadings are set out.

(and amongst others the defendant) failing to make their due payments, they were declared defaulters; and, according to the rules of the Stock Exchange, all their transactions were closed at the prices current on that day. (1) The result of this was to make them liable to pay a further sum for differences upon the stocks and shares so carried over by them for the defendant. The plaintiffs had paid a dividend of 6*s.* 6*d.* in the pound to their Stock Exchange creditors, and a further dividend was expected. This action was brought in the names of the plaintiffs, but for the benefit of their creditors, to recover the sum of 6013*l.* 13*s.* 5*d.*, which included the 1688*l.* 19*s.*, as well as the sum which the defendants became liable to pay upon their being declared defaulters.

In the second action, *Duncan* v. *Beeson* (2), the appeal was against the judgment of the Court of Exchequer discharging a rule to enter a nonsuit which had been obtained on the ground that the defendant was not liable to make good any part of the loss incurred by the closing of defendant's share account upon the plaintiffs becoming defaulters on the Stock Exchange; that the account was closed contrary to defendant's authority and against his will, and owing to the plaintiffs' own defaults, and that defendant was not liable to indemnify plaintiffs against the loss thereby occasioned to or paid by the plaintiffs; that no usage of the Stock Exchange was proved sufficient to make the defendant liable to this action, and that the usage, if any, did not extend to entitle a broker to charge a loss arising from his own default against his principal.

The plaintiffs were the same as in the other action, and the facts were similar, except that the sum paid by the plaintiffs for differences in carrying over the stocks on the 15th of July, had before action been repaid by the defendant. The sum sought to be recovered was 425*l.* (3)

May 16. *Joseph Brown, Q.C.* (*Sir J. B. Karslake, Q.C., & J. O. Griffits* (in *Duncan* v. *Hill*) and *Philbrick* (in *Duncan* v. *Beeson*) with

(1) See Rules 142, 167, 169, ante, vol. 6, p. 257, n.

(2) Reported Law Rep. 6 Ex. 268, n.

(3) It was stated in the appeal case, in *Duncan* v. *Beeson*, that, according to a well-known practice on the Stock Exchange (though not contained in the printed rules), if the defendant had, after the plaintiffs were declared defaulters, and on the same day, gone

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him) for the defendants in both actions. It is true that a principal is bound to indemnify his agents against any loss necessarily incurred, or any expenditure necessarily made, by the agent in carrying out the commissions he is intrusted with, and entering into the contracts which he was employed to make. It must be admitted, therefore, that the defendant Hill is bound to repay the sum of 1688*l.* 19*s.* which the plaintiffs paid for carrying over the contracts on the 15th of July. It is also true that if the agent is employed to buy and sell on the Stock Exchange, the principal will become liable to third persons, who, by virtue of the customs of the Stock Exchange, become sellers to or buyers from him, according to the rules of the Stock Exchange; and it may be admitted further that, with respect to such buyers and sellers, he is subject to the rule under which, on his agent being declared a defaulter, the contracts made by the agent on his account are liable to be peremptorily closed. But that the agent, whose default has caused the contract to be peremptorily closed, should be entitled to charge the principal with the sums which he has in consequence become liable to pay, is within neither of these propositions, and is contrary to the general principles of the law. "If an agent has, *without his own default*, incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefor. . . . But it is not every loss or damage for which the agent will be entitled to reimbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency." Story on Agency, §§. 339, 341; and see Pothier, Mandat, ch. 3, s. 1, art. 1 (ed. Dupin, 1835, vol. 4, pp. 237, 247); Paley on Principal and

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to the official assignee of the Stock Exchange with another broker, who was ready and willing to take upon himself the rights and liabilities of the plaintiffs towards the defendant as his broker, and to be substituted for them as the defendant's broker in regard to this particular contract, the official assignee would have put the defendant and such other broker in communication with the jobber from whom the plaintiffs had purchased the shares on the defendant's account, and such jobber would have been bound to keep the same open for defendant, precisely in the same manner as if the plaintiffs had not been declared defaulters. This custom, however, was not known to the defendant.

Agent, pp. 112, 113, 116 (ed. Lloyd, 1833). Now it is clear that the closing of the account, and the liability to pay the money, was due to the plaintiffs' own default; and also that it was not due to their carrying out the contract which they were instructed to make. Suppose the broker were to fail to pass a ticket within rule 87, or to deliver shares or stock under rule 98 (1), he could not charge his principal with the consequences of his default. The case is the same where his contracts are prematurely closed in consequence of his being declared a defaulter; and the fact that the rules of the Stock Exchange authorize such an involuntary closing as between their own members, does not affect the contract between the outside principal and his agent. The agent was employed to carry out the contract according to the rules; in fact, he has broken the rules, and so incurred liability. The judgment of the Court below seems to have overlooked the distinction between the effect of the rules upon the contracts which the principal makes with those with whom he contracts through his agent upon the Stock Exchange, and their effect upon the contract between the principal and his agent. If the plaintiffs could succeed in this action, the defendants would be entitled to recover back the same amount from them in an action for breach of their duty; so that on the ground of circuity of action alone the defence is good.

Sir J. D. Coleridge, Q.C., S.G. (*Powell, Q.C.*, and *Day, Q.C.*, with him), for the plaintiffs in the first action (*Duncan* v. *Hill*). To argue that circuity of action forms a good defence here is plainly unsound, for the measure of damages in the two actions would be wholly different. In the present action it would be the amount which the broker became liable to pay on the closing of the account; in an action against them it would be the loss which the principal had sustained by the premature closing, which might be much more, or, on the other hand, might be nothing at all, for it might well be that the premature closing might avert a much greater loss. But it also follows as the result of the cases already decided on this subject, that the rules prevailing on the Stock Exchange are (unless obviously unreasonable) to be taken as entering into the contract between the principal and his broker. If, as *Grissell* v. *Bristowe* (2) and other cases establish, the principal becomes, in respect of the contract which he empowers his broker

(1) See these rules, Law Rep. 4 C. P. pp. 54, 56.

(1) Law Rep. 4 C. P. 36.

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to make, subject to the rules of the Stock Exchange, he is bound by, and entitled to take advantage of, the rules by which the affairs of a defaulting broker are settled. And this is conceded by the defendant. But he is so bound and entitled only by reason of his employing the plaintiffs as his agents, through whom he obtains benefits which it would be impossible for him to enjoy in any other way: per Kelly, C.B., in *Grissell* v. *Bristowe*. (1) He cannot then claim these advantages through his brokers, and at the same time insist on treating the broker as if no such usage prevailed. There is no doubt that if, through the default of another member of the Stock Exchange, his contracts were prematurely closed, he would be bound to pay his broker any differences which the broker thus became liable to pay; and it can make no difference that the closing is caused by the inability of the broker himself to meet his engagements. Indeed, the defendant was himself the cause, in part at least, of this default. On the other hand, the plaintiff's default would have led to no such result but for the rules of the Stock Exchange. The reasonable view is, that whenever a payment is made, or a loss caused, or a liability incurred, in respect of a contract made on the Stock Exchange, by reason of the rules of the Stock Exchange, the principal who has employed the broker to make that contract must indemnify him.

[He referred to *Bowring* v. *Shepherd*. (2)]

Powell, Q.C. (*Murphy* with him), for the plaintiffs in *Duncan* v. *Beeson*, did not argue.

Brown, Q.C., in reply.

Cur. adv. vult.

June 26. The judgment of the Court (Blackburn, Keating, Grove, Brett, Quain, Archibald, and Honyman, JJ.) was delivered by

8 Ch 925.

BLACKBURN, J. The plaintiffs in these two actions are stock-brokers who, on the 18th of July, 1870, were declared defaulters on the Stock Exchange, and the actions are brought in their names on behalf of their Stock Exchange creditors. The defendants respectively had employed the plaintiffs as their brokers to carry over, or continue, as it is called, contracts for the purchase of shares from the account-day on the 15th of July, 1870, to the next account-day, which was the 29th of July, 1870.

(1) Law Rep. 4 C. P. at p. 52. (2) Law Rep. 6 Q. B. 309.

In the first of these actions a sum of 1688*l.* 19*s.* had been paid by the plaintiffs at the request of the defendant, in order to have the contracts carried over, as it is called, to the 29th of July, 1870. The verdict in that case was for 6013*l.* 13*s.* 5*d.*, and included that sum of 1688*l.* 19*s.*, as well as the amount of the differences on the closing of the account on the brokers becoming defaulters, as will be presently explained. This verdict was subject to leave reserved to enter a verdict for the defendant or to reduce the damages to 1688*l.* 19*s.* A rule was accordingly obtained, which, after argument, the Court of Exchequer discharged. It is now admitted that the plaintiffs are entitled to retain their verdict for 1688*l.* 19*s.*, and the only question on appeal is, whether the rule should have been made absolute to reduce the damages to that amount.

In the other action, the defendant had before action paid everything that was due before the account was closed, and the verdict was for the amount of the differences on the closing of the account, subject to leave to move to enter the verdict for the defendant. A rule was accordingly obtained, which the Court of Exchequer discharged. In that action, therefore, the question on appeal is, whether the rule should have been made absolute to enter a verdict for the defendant.

In both cases the only question is, whether the creditors of the brokers can maintain an action in the name of the brokers against their customers, to recover the differences on the compulsory closing of the accounts on the brokers being declared defaulters. It appears by the case, that the effect of the carrying over the contracts from one account day to the next account is, that the brokers enter into contracts with jobbers for that account day; and that the jobber with whom the contract is made is in precisely the same position towards the broker and his customer, as if there had been no previous contract, and an original contract had been made with the jobber for the ensuing account.

Both actions, whatever be the precise form of them, are actions, in contemplation of law, brought by the plaintiffs, as brokers and agents, against the defendants, as their principals, for an indemnity. They are founded upon allegations that the agent has incurred a loss by reason of having acted as agent for his principal. They are actions founded on the ordinary and general principles of common law with regard to implied indemnities. It must be

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admitted that the plaintiffs were authorized by the defendants to enter into contracts in their behalf according to the rules of the Stock Exchange. It must be admitted that for any loss incurred by the agent by reason of his having entered into such contracts according to such rules, unless they be wholly unreasonable, and where the loss is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect. But it is argued, that where the agent, as in this case, is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of a default of his own, that is to say, as in this case, by reason of his insolvency, brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify him; and in the present cases there certainly was no express promise to this effect. These allegations, both as to fact and law, seem to us to be correct. There was no failure by the defendants in any part of their undertakings; there was no evidence that the insolvency of the plaintiffs was occasioned by reason of their having entered into the contracts for the defendants; it is consistent with the evidence that the plaintiffs would have become insolvent precisely at the same time as they did if they had not entered into any contract for either of the defendants. The plaintiffs' insolvency was, so far as regards the defendants, entirely the result of their own default. We think there is no implication of law to force upon the defendants an obligation to indemnify the plaintiffs in such a case.

We think, therefore, that the judgment below should be reversed, and the rule in the case of *Duncan* v. *Hill* be made absolute to reduce the damages to 1688*l.* 19*s.*, and in the case of *Duncan* v. *Beeson* that the rule be absolute to enter a verdict for the defendant.

Judgment reversed.

Attorney for plaintiffs in both actions: *J. Tucker.*

Attorney for defendant in *Duncan* v. *Hill*: *Oehme.*

Attorneys for defendants in *Duncan* v. *Beeson*: *Whites, Renard, & Co.*

[IN THE EXCHEQUER AND THE EXCHEQUER CHAMBER.]

1873
June 26.

GRAY *v.* FOWLER.

Vendor and Purchaser—Conditions of Sale—Power to rescind—Imperfect Abstract —Objections not disclosed by Abstract.

The defendant, in March, 1868 (as surviving devisee in trust), sold by auction to the plaintiff's testator land and tolls (lots 3 and 4) under certain conditions. Condition 3 provided that the vendors were to deliver to the purchaser an abstract of title within seven days from the sale, the purchaser was to make his objections and requisitions within twenty-one days of the delivery of the abstract, and all objections and requisitions not made within that time were to be taken to be waived; "and in case any purchaser shall make any objection or requisition on the title of the respective lots which the vendors shall be unwilling or unable to answer or comply with, the vendors reserve to themselves the option, notwithstanding they may have attempted to answer or comply with such objections or requisitions, or may have partly done so, at any time to rescind the contract for sale of the lot or lots, in respect of which such objections or requisitions shall be made, upon repaying or tendering to such purchaser or purchasers the deposit money, without interest, costs, or expenses, in full of all claims or demands for the investigation of title or otherwise."

An abstract was delivered, on which the purchaser made and insisted on two objections, of which one (as to lot 3) was frivolous, and the other (as to lot 4) was an objection as to quantity, in respect of which he was, under another condition, only entitled to compensation, which was offered.

The defendant thereupon, on the 24th of July, filed a bill in Chancery for specific performance, and the purchaser on the 23rd of September put in an answer, in which he reiterated his objections, and also objected to complete on the ground of certain transactions affecting lot 4 which had not been disclosed by the abstract.

These transactions were known to the vendor at the time of the sale, and were intentionally, but bonâ fide omitted from the abstract, as it was supposed they did not affect the title. The contents of the deeds relating to these transactions were first communicated to the plaintiff by an affidavit, made by the defendant in this action under an order for discovery; but the deeds were previously known to his attorney, who had been a clerk in the office where they were prepared.

On the 2nd of December the purchaser died; on the 26th of January, 1869, the vendor's solicitor wrote to the solicitor of the purchaser requesting particulars of the probate of his will; and on the 12th of February the vendor (the now defendant) announced his intention to rescind, and afterwards formally rescinded the contract and tendered the deposit.

An order was made in the suit that the defendant, the plaintiff in the suit, should revive it or that the bill should be dismissed without costs, and the suit not being revived, the bill was dismissed accordingly.

In an action brought by the plaintiff against the defendant for not deducing a

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good title, and for fraudulently representing that he had and would deduce a good title, the arbitrator, to whom the facts were referred, having negatived fraud:—

Held by the Court below (Kelly, C.B., Martin, B., and Cleasby, B.; Bramwell, B. dissenting), that the defendant was entitled to rescind. Error being brought:—

Held by the Court of Exchequer Chamber (Blackburn, Keating, Brett, Archibald and Honyman, JJ., Grove, J., dissenting), that the defendant had, by filing his bill elected not to rescind on any of the original objections, but that the third condition applied to all objections to the title whether appearing on the abstract or not; that the defendant was, therefore, entitled to rescind on account of the objection as to lot 4 raised by the answer, and founded on the transactions which were omitted from the abstract; and that the delay from the filing of the answer on the 23rd of September, 1868, to the 12th of February, 1869, was not unreasonable.

Quære whether, if an action had been brought against the defendant for breach of his contract to deliver a true abstract, the plaintiff could, under the circumstances, have recovered substantial damages.

SPECIAL CASE stated by an arbitrator, to whom the action was referred (1).

The action was brought by the executor of J. G. Leete, who, on the 26th of March, 1868, purchased lots 3 and 4, part of certain property put up for sale by the defendant under the following circumstances:—

The defendant, as surviving devisee in trust under the will of

(1) The first count of the declaration was for not deducing a good title to property, of which Leete, the plaintiff's testator, was purchaser from the defendant; the second was for a fraudulent misrepresentation by the defendant to Leete, that he had and would deduce a good title; the third was for money had and received.

The pleas were to the first count: 1, denial that Leete was purchaser; 2, rescission of the contract under the third condition stated below upon certain objections and requisitions made by Leete; to the second count, not guilty; and to the third count, except as to 55*l.*, never indebted, and as to the 55*l.*, tender and payment into court.

The plaintiff joined issue and replied, equitably, to the second plea, that the defendant had, since the objections and requisitions referred to in the second plea, filed a bill in Chancery against Leete for specific performance of the contract, and had not dismissed it, nor dismissed it with costs; and to the last plea, that more than 55*l.* was due as one entire sum, and in respect of a single entire contract.

The defendant joined issue on the replications, and demurred to the equitable replication; and also rejoined to the same that the suit had been dismissed without costs on the application of the plaintiff as Leete's personal representative, after which the defendant elected to rescind.

The plaintiff joined issue and demurred.

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William Parker, put up the property for sale by auction on the 26th of March, 1868, under particulars and conditions which, so far as is material, were as follows:—

The particulars described lot 3 as comprising "the tolls arising from the fairs and markets held at Thrapston, also a plot of ground used for storing market stalls, and a quantity of market stall fittings;" and lot 4 as comprising an equal undivided third part or share of six freehold cottages.

The third condition was as follows:—"Within seven days from the day of sale the vendors shall at their own expense make and deliver to every purchaser or his solicitor an abstract of the title of the vendors, according to the conditions, to the lot or lots purchased by them respectively, and the purchaser shall make his objections and requisitions, if any, in respect of the title, and send the same to Messrs. Palmer, Eland, & Nettleship within twenty-one days from the day of the delivery of the abstract, and all objections and requisitions which shall not be made and sent within the time specified shall be taken to be waived, and for this purpose time shall be of the essence of the contract; and in case any purchaser shall make any objection or requisition on the title of the respective lots which the vendors shall be unwilling or unable to answer or comply with, the vendors reserve to themselves the option, notwithstanding they may have attempted to remove or comply with such objections or requisitions, or may have partly done so, at any time to rescind the contract for sale of the lot or lots in respect of which such objections or requisitions shall be made, upon repaying or tendering to such purchaser or purchasers the deposit money without interest, costs, or expenses in full of all claims or demands for the investigation of the title or otherwise."

The 5th condition stated that the abstract to be delivered should, as to lot 3, commence with the conveyance to the late Mr. Parker, dated the 11th of October, 1860, from the trustees under the will of T. Burton. . . . "Lot 4 is sold by the said trustees under a power of sale in a mortgage made to W. Parker, and the abstract to such lot will commence with a will dated in 1802. . . . The vendors shall not be required to verify the abstract of title to lot 4, further than by the production of the

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mortgage deed under which they sell, no earlier documents of title being in their possession or power."

The 8th condition stated that the muniments of title in the vendor's possession to lot 4 would be handed to the purchaser on completion.

The 10th condition provided that if any mistake should be made in the description of the property or the extent of any undivided share, it should not (if capable of compensation) annul the sale, but compensation should be allowed by the vendors.

At the sale J. G. Leete was declared the purchaser of lot 3 for 450*l.*, and lot 4 for 100*l.*, and he thereupon paid a deposit of 55*l.*, and signed an agreement for the purchase of both lots for 550*l.*, subject to the particulars and conditions of sale.

Abstracts of title to lots 3 and 4 were delivered to the purchaser within the time specified.

On the 15th of April, 1868, it was objected by the purchaser that no title was made to lot 3, inasmuch as "T. Burton devised all his hereditaments situate, lying, and being in the several parishes of Thrapston, &c., and W. Parker again devised all his hereditaments situate in Thrapston or elsewhere," whereas "market tolls are in the nature of incorporeal hereditaments, and cannot be said to be situate anywhere." To this the vendor's solicitor replied that there was no doubt the tolls passed. The purchaser also required the right to hold fairs and markets to be made out by production of the original grant or by some recognition of it in a court of record, to which the vendor replied by referring to the 5th condition.

As to lot 4, it was objected that the vendor could only make a title to a fourth, and not a third of the premises described; to which the vendor replied by referring to the 10th condition, and that the purchaser would be entitled to an abatement.

On the 25th of May the vendor, without taking any further notice of the answer as to lot 4, insisted on the second requisition as to lot 3.

Subsequently, upon being threatened by the vendor with a suit for specific performance, the purchaser expressed his willingness to waive his objection as to lot 4, upon having the abatement made, and offered to separate the contract into two

if the vendor desired it (which offer the vendor accepted), but persisted in his objection as to lot 3. The vendor offered to produce reasonable evidence of the actual enjoyment of the right, but the purchaser still refused to complete.

On the 24th of July, 1868, the vendor filed a bill against J. G. Leete to enforce specific performance of the contract, alleging (amongst other things) that the defendant was well aware of the title under which W. Parker bought on the 6th of June, 1860, and (by par. 30) stating as follows: "The defendant now raises no objection to the title to the said lot 4, which lies apart from and is unconnected with, lot 3, and he is willing to complete the purchase of lot 4 at the said price of 100*l.*, without prejudice to any question as to lot 3;" and by the prayer of the bill he asked; 1, that the defendant might be decreed specifically to perform his said contract, or, in case the said purchase of lot 4 at 100*l.* should have been previously completed, then that he might be decreed specifically to perform the said contract as to lot 3, and to pay the balance of the said sum of 550*l.*, or 450*l.*, as the case might be, with interest; 2, that it might be declared that the defendant was not at liberty to require any grant of the market or any title thereto, other than such as was stated in the 5th condition.

On the 23rd of September, 1868, the plaintiff's testator filed his answer to this bill.

The 10th paragraph of it, so far as it relates to lot 4, and the 31st and 32nd, are all that it is necessary to notice. They were as follows:

"10. And as to lot 4, I say that the abstract so delivered was defective in several material particulars; and especially I allege that between the date of the said will in 1802 and the said sale of the 26th of March, 1868, the plaintiff, or the said testator William Parker, had dealt with the property comprised in lot 4 in a manner materially affecting the title thereto; and such dealing, although well known both to the plaintiff and to Messrs. Palmer, Eland, & Nettleship, his solicitors, was improperly omitted from the said abstract; and, except as hereinbefore appears, I deny that abstracts of the title to lots 3 and 4, commencing as to lot 3 with the conveyance of the 11th of October, 1860, and as to lot 4

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with the will of 1802 in the said conditions of sale respectively mentioned, were duly delivered within the time specified by the said conditions."

"31. I do raise an objection to the title to lot 4 in the plaintiff's bill mentioned. Such objection was raised for the first time in the requisitions delivered to the plaintiff's solicitors, and was to the effect that the plaintiff's title extended only to one undivided fourth part of certain cottages, instead of one undivided third part, as described in the particulars of sale, and the objection has been acquiesced in by the plaintiff's solicitors. I also now object to the title to the said lot 4, on the ground that the true state of such title was not disclosed by the abstract furnished to me by the vendor's solicitors, inasmuch as such abstract was defective, as stated in the 10th paragraph of this my answer.

"32. I admit that the said lot 4 lies apart from lot 3, and except that it is comprised in the same contract, it is unconnected with it. But I say I am not willing to complete the purchase of lot 4 at the price of 100*l.*, or at all, with or without prejudice to any question as to lot 3. On the contrary, I insist on all the objections to the title of each of the said lots as a ground for refusing to complete the purchase of either of them."

The defect insisted upon by the 10th and 31st paragraphs, was the omission from the abstract of the following conveyances:—

By a deed dated the 7th of June, 1860, reciting that by a deed of the 28th of October, 1858, one Collier mortgaged to W. Parker to secure repayment of 100*l.* and interest the undivided third part of the said six cottages, and reciting that on the 19th of April, 1859, Collier conveyed to J. Castle and W. Parker all his real estate on trust for sale for the benefit of his creditors, and reciting that there was due to W. Parker on his mortgage the sum of 111*l.*, and that J. Castle and W. Parker had contracted with W. Smith for the sale to him, by private contract, of the said hereditaments for 111*l.*, it was witnessed that, in consideration of the payment of that sum to W. Parker (at the request and by the direction of J. Castle and W. Parker as trustees), by W. Smith in full satisfaction of all moneys secured by the mortgage, W. Parker granted and conveyed, and J. Castle and W. Parker, as such trustees, granted and confirmed to W. Smith, his heirs and assigns, all that

undivided third part of the said six cottages, freed and absolutely discharged from the said indenture of mortgage, and all principal and interest thereby secured.

On the 25th of January, 1866, W. Smith signed a memorandum acknowledging that the share so conveyed was the absolute property of W. Parker, and that his name was inserted in the deed of the 7th of June, 1860, as grantee, to the intent that he should hold the said share as trustee for W. Parker, and to be disposed of as he should direct.

By a deed of the 11th of March, 1868, indorsed on the deed of the 7th of June, 1860, after reciting to the effect stated in the memorandum, and that W. Parker by his will, dated the 18th of April, 1859, and proved the 12th of July, 1867, devised all his real estate, including estates vested in him as mortgagee, to R. Fowler (the defendant), and R. Archbould, upon certain trusts, W. Smith granted and conveyed to R. Fowler and R. Archbould, and their heirs, the said share, to have and to hold the same upon the trusts declared thereof by the said will, and subject to such equity of redemption as was subsisting in the said premises.

The arbitrator found, as a fact, that the recitals in the deed of the 7th of June, 1860, were true; that the three documents of the 7th of June, 1860, the 25th of January, 1866, and the 11th of March, 1868, were omitted from the abstract intentionally, but bonâ fide, and under the advice of counsel, as it was supposed that they did not affect the title; that the last-mentioned documents were known, from their respective dates, to Archbould; that the deed of the 11th of March was prepared by the solicitors of the devisees in trust of Parker's will, and was approved by Archbould on behalf of Smith; that Hawkins, the plaintiff's attorney in this action and in the suit, obtained a knowledge of the contents of the documents through being at that time a clerk in Archbould's office (Archbould's approval of the deed of the 11th of March being in his handwriting); that the said documents were also in the possession of the defendant Fowler, but were not known at the time of the auction to the purchaser, and their contents were first communicated by the defendant to the plaintiff in an affidavit of the defendant made in this action, pursuant to an order for discovery of documents.

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The arbitrator also found that, in 1867, the defendant Fowler

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had contracted to sell lot 4 to Lord Lyveden, and his solicitors delivered to Archbould, as solicitor of the intending purchaser, an abstract of title which included the will of 1802, the mortgage of 1858, and the documents of the 7th of June, 1860, and the 25th of January, 1866; that objection was taken to the title in respect of the conveyance to Smith; that the contract was thereupon, in January, 1868, abandoned, and the deed of the 11th of March, 1868, was afterwards executed.

On the 2nd of December, 1868, J. G. Leete died, and on the 26th of January, 1869, the solicitor to Fowler (the now defendant), wrote to the solicitors of Gray (the now plaintiff), requesting an extract from Leete's will, shewing the appointment of executors, in order that they might revive the suit, "which we will do at once." This information was furnished them on the 11th of February, and on the 12th, Fowler's solicitors replied as follows: "We shall rescind the contract, and present petition to dismiss bill, upon grounds which we will explain in a future letter."

On the 13th of February, upon a petition presented by the then plaintiff to the Master of the Rolls, an order was made that the bill do stand dismissed, with costs, to be taxed and paid by the petitioner to the defendant; and on the 17th a copy of the order was sent to the solicitors of Leete's executors, accompanied with a formal notice rescinding the contract and offering to repay the deposit.

The solicitors of Leete's executors objected that the order was informal in directing costs to be paid to a dead man, and declined to act upon it, although the then plaintiff's solicitor offered to give their undertaking to pay the costs to the order of Leete's executors; and on the 4th of March, upon a motion by the now plaintiff, as executor of Leete, that the plaintiff in the suit should, within one month, obtain and serve on the executor an order to revive, or that in default the bill should stand dismissed for want of prosecution, with costs, an order was made, otherwise in the terms of the motion, but without costs. No order to revive was obtained.

On the 12th of April the now plaintiff's solicitor wrote to the solicitors for the now defendant, requiring compensation for the breach of contract, and on the 13th the sum of 55*l.*, the amount of the deposit, was tendered to them, which they declined to receive

on the ground that a larger sum was due, and on the 20th the present action was commenced.

The arbitrator found further as follows: "That, as admitted on the pleadings, the defendant did not deduce or shew a good title to the property sold to the said J. G. Leete, but that there was no fraud or fraudulent misrepresentation on the part of the defendant, and that he always believed he had and could make, a good title to both of the said lots, and that the election made by the defendant to rescind the contract of sale always continued from the said 17th day of February, 1869, hitherto; and I find as a fact, that according to the true construction of the said will and codicil he could not make a good title to more than one quarter of lot 4, or remove the objection to that effect originally made by the purchaser, and insisted on by the 10th and 31st paragraphs of the purchaser's answer; but I also find as a fact that the said rescission or attempted rescission of the contract by the defendant, was not from unwillingness or inability on his part to answer or comply with objections to or requisitions on the title to the said lots or either of them."

As to certain specific issues raised by the pleadings, the arbitrator found, on the issue raised by the 2nd plea (subject to the opinion of the Court), "that the defendant did not, according to the 3rd condition of sale, rescind the contract;" on the issue raised by the 3rd plea, that the defendant was not guilty of fraud, and on the issue raised by the last plea, that the defendant was not entitled to rescind under the 3rd condition; and he assessed the damages contingently, so as to enable the Court to give final judgment as follows: costs of investigating title, 22*l.* 15*s.*; interest on costs and on deposit (1), 9*l.* 15*s.*; loss of bargain, 250*l.*; costs of Chancery suit, 67*l.*

The Court was to be at liberty to draw inferences of fact; and the questions for the opinion of the Court were; 1, whether, under the circumstances of the case, the defendant had power to and did rescind the contract of sale within the meaning of the 3rd condition of sale; 2, whether the plaintiff was entitled to damages for loss of bargain; 3, whether the plaintiff was entitled

(1) The deposit was brought into Court under a plea of tender.

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to recover in this action the costs of defending the Chancery suit, or any and what part thereof.

May 30, 1871. *Quain, Q.C.* (*Speke* and *C. E. Hawkins* with him), for the plaintiff. The defendant has not, in fact, exercised the power of rescission given him by the 3rd condition. The objections and requisitions mentioned in the clause of that condition which gives the power to rescind, are objections and requisitions arising directly out of the abstract, or out of requisitions made upon it, but not such as may be made upon facts discovered aliunde. The former part of the condition relates to the delivery of the abstract, and the clause as to rescission, which follows it, must therefore be limited to matters arising out of the abstract so delivered. This is the obvious and fair construction, and the form of condition in *Steer* v. *Crowley* (1) shews how a condition should be drawn if it is intended to give the vendor power to rescind upon an objection not arising out of the abstract; and if a doubt arises as to the extent of the power given, it must be determined against the vendor, who has inserted the clause in his own favour. But in fact the construction is placed out of doubt by the limit fixed, for it could never be intended, without express words, to treat the vendor as having waived, in twenty-one days from the delivery of the abstract, an objection which, by reason of the imperfection of the abstract, he never had the opportunity of making, and to compel him to accept the title notwithstanding such objection. The clause as to the implied waiver of objections cannot therefore be read as applying to such objection; but if not, then neither can the clause as to rescission, for the objections and requisitions referred to in both clauses must be the same. If, then, the defendant rescinded on the ground of the objection arising out of the suppressed deeds, his rescission was invalid. But it was equally invalid if he rescinded on the objections which were in fact made upon the abstract, because he had determined his election by filing his bill for specific performance of the contract: *Tanner* v. *Smith* (2); *Morley* v. *Cook* (3); *Gardom* v. *Lee.* (4) And again, even if he was ever

(1) 14 C. B. (N.S.) 337; 32 L. J. (C.P.) 191. 9 Jur. N.S. 1292.
(2) 10 Sim. 410.
(3) 2 Hare, 106.
(4) 3 H. & C. 651; 34 L. J. (Ex.) 113. 11 Jur. N.S. 893.

at liberty to rescind upon the ground of the objection arising out of the suppressed deeds, he had determined his election on this also; for he was bound to make his election within a reasonable time, and his delay from the time when that objection was disclosed till the 11th of February was unreasonable: *Shoreditch Vestry* v. *Hughes.* (1) Further, the defendant was not entitled to rescind without first dismissing his bill with costs: *Warde* v. *Dixon.* (2) Again, his right to rescind did not arise till he had delivered a perfect abstract, which he has never yet done. Lastly, the defendant is concluded by the finding of the arbitrator that his rescission was not made from inability or unwillingness to answer or comply with objections to or requisitions as to the title. [He also cited Dart, Vend. and Pur. 4th ed., vol. i. pp. 147, 276.]

Secondly, if the plaintiff is entitled to recover at all, he is entitled to damages for loss of bargain; the defendant was guilty of misconduct in suppressing the deeds, and this circumstance takes the case out of the rule of *Flureau* v. *Thornhill* (3), and brings it within *Hopkins v. Grazebrook.* (4) Thirdly, the plaintiff is also entitled to the costs of the Chancery suit.

[BRAMWELL, B. Can it be said that the defendant filed his bill in Chancery because he had no title?]

Kemplay, Q.C. (*Bagshawe* with him). The defendant's power to rescind is not limited to objections arising out of the abstract, and no inquiry can be made as to the motive of his unwillingness to comply with the objections if he was in fact unwilling. As to the alleged misconduct of the defendant, the plaintiff cannot complain of the omission of the deeds, for they were known to his attorney: *Dresser* v. *Norwood.* (5)

Quain, Q.C., in reply. In equity, knowledge obtained by the attorney in a different transaction is not notice to his client: *Worsley* v. *Lord Scarborough.* (6)

Cur. adv. vult.

May 31. The following judgments were delivered:—

CLEASBY, B. It appears to me that the defendant is entitled to

(1) 17 C. B. (N.S.) 137; 33 L. J. (C. P.) 349.
(2) 28 L. J. (Ch.) 315.
(3) 2 W. Bl. 1078.
(4) 6 B. & C. 31.
(5) 17 C. B. (N.S.) 466; 34 L. J. (C. P.) 48.
(6) 3 Atk. 392.

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judgment. Three questions are raised; first, whether under the circumstances the defendant had the power to rescind; secondly, whether the plaintiff is entitled to damages for loss of bargain; thirdly, whether the plaintiff is entitled to recover the costs of defending the Chancery suit. I shall say very little upon the second and third questions. I think even if the plaintiff is entitled to recover, it is not for the loss of bargain. This is a contract for the sale of real property, and unless there is something to bring the case within the exception established in *Hopkins* v. *Grazebrook* (1) it falls within the rule of *Flureau* v. *Thornhill*. (2) Now, if it is not made out that the title was a good one, it is at all events negatived that the defendant knew it to be bad; so that the plaintiff's claim to damages stands simply on the footing of the title not being a good one.

Then with reference to the costs of the Chancery suit, this is not a case in which the plaintiff has instituted proceedings in Chancery for the purpose of enforcing a contract. If that were so, I should consider whether it was so far a matter arising out of the contract, that he would be entitled to recover the costs as part of the damages for breach of contract. But here it appears adverse proceedings have been taken against him, and with respect to the costs of those adverse proceedings, it is impossible to say they were in any way caused by the breach of the contract.

Now I come to the real question in the case; and that depends on the 3rd condition. The facts are that the executor of the plaintiff bought two lots, No. 3 and No. 4, separately, at separate prices, but when the matter was carried into effect by an indorsement on the condition of sale, there was only one contract entered into, a contract for 550*l.* purchase-money for the two lots. Now the 4th lot was one undivided third part of certain property, and the 10th condition provided that "if any mistake should be made in the description of the property or the extent of any undivided share, it should not annul the contract, but compensation should be allowed by the vendors." An objection was taken as to lot 4, that the abstract shewed a title, not to a third part, but only to a fourth part. The answer to that was, that it came within the condition that a mistake or error as to the extent of the undivided part

(1) 6 B. & C. 31. (2) 2 W. Bl. 1078

should not avoid the sale, and both parties seemed to agree to that answer. At least, the bill was founded upon that state of facts, and upon the assumption that there was no question whatever as to lot 4 (though there seems to have been some mistake in the thirtieth paragraph of the bill, in making no deduction from the price at which that lot was to be taken), and by its prayer the bill, assuming that there would be no difficulty in specific performance as to this part, goes on to pray that the then defendant may be compelled to pay the 450*l.* which was the price of the other lot. Then an answer is put in, in which the objection to lot 4 is insisted upon.

Another objection is also made in the answer, which would be a defence to the suit, namely, that the then plaintiff had not furnished a proper abstract of title, but the objection as to lot 4 is continued as a valid objection, and insisted on as a ground for resisting performance of any part of the contract, thus treating the whole as one contract. Now, the question arises, whether upon that the present defendant was entitled to rescind under the 3rd condition. I have had some doubt whether what was done took place within a reasonable time. In September the answer was put in, insisting upon this objection as to lot 4; then, on the 2nd of December the defendant in the suit died; then early in January, the plaintiff in the suit took proceedings for getting rid of the suit; in February he rescinds the contract, but informally, because it was before the bill had been properly dismissed; in April, the bill having been got rid of altogether and taken off the file, he exercises his power to rescind. I cannot say that under all the circumstances, that was an unreasonable delay. The time which it is most difficult to account for is the time from September to December; but, upon the whole, I do not think that he had precluded himself from exercising the power to rescind. It is clear that the mere circumstance of a bill having been filed does not prevent a vendor from rescinding; although a subsequent waiver by a purchaser of an objection raised by him in a suit for specific performance will do so: *Duddell* v. *Simpson.* (1) But the objection made here was, that a bill having been filed by the

(1) Law Rep. 1 Eq. 578; Law Rep. 2 Ch. 102; 12 Jur. N.S. 969.

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vendor, the bill had not been dismissed with costs, and a case of *Warde* v. *Dixon* (1) before Kindersley, V.C., was referred to, in which it was said that the bill must be dismissed with costs before the right to rescind could be exercised. But that case assumes that the vendor still has the power to rescind, provided he gets rid of the bill in that way; so that the question here really stands upon the original contract unaffected by any subsequent proceedings. Now, it is quite certain that if an objection is waived you cannot rescind; and as long as the objection as to lot 4 continued to be treated as waived, the right to rescind upon that objection did not exist. Therefore the question turns upon whether the objection still existed, and upon the effect of the answer which again set up that objection. Now, it seems to me plain that nothing had taken place equivalent to a new contract; so as to entitle either party to say that the old contract no longer existed. That old contract the defendant in the suit says he is not bound to perform, because of this objection, which was an objection made under the old contract, and which was a valid and subsisting objection. The vendor was therefore entitled to rescind. That the objection and the rescission were complicated with the other objection as to the title of lot 3, I think, makes no difference. I think, therefore, that the defendant is entitled to the judgment of the Court. I should add that I do not think the vendor was guilty of any impropriety in not setting out in the abstract of title, deeds which, by the advice of counsel, he considered unimportant.

BRAMWELL, B. The arbitrator has raised three points for our decision. I think it is not necessary to add anything to what was said in the course of the argument as to the costs of the Chancery suit; they are not costs incurred in consequence of the title being bad, and therefore the plaintiff cannot recover them.

Upon the second question, whether the plaintiff is entitled to damages for loss of bargain, I do not dissent from the opinion of my Brother Cleasby, which I understand to be also the opinion of my Lord and my Brother Martin; though, if the question had become of any practical consequence, I should have wished for

(1) 28 L. J. (Ch.) 315.

time to consider it more carefully, because there are circumstances here which make me doubt whether the case is governed by the authority of *Flureau* v. *Thornhill.* (1) The arbitrator finds distinctly that there was no fraud in omitting the conveyances from the abstract, on which no doubt they ought to have been put. I do not mean to insinuate there was fraud; I think there was no intention to do anything wrong, but that it was thought, if a conveyance had been taken by the plaintiff without notice, he would have got a good title, and would have had nothing to fear. But I am strongly inclined to think that no man has a right to represent to another that a state of things exists which is not the true state of things, with the intention that that other person should act upon it; the other is entitled to exercise a judgment upon the matter himself. Therefore the plaintiff has a right to complain that the defendant, knowing the truth, did not think proper to tell it to him; the state of facts on which he was induced to act was different from the real state of facts. Now I am not sure that this does not take the case out of the authorities referred to, and I refer to the judgment of my Brother Cleasby in the case of *Bain* v. *Fothergill* (2), where he says, "We are, therefore, thrown back on the case of *Flureau* v. *Thornhill* (1), which establishes that, where there is no fraud and no express contract to sell property with a knowledge on the vendor's part that he has not the title to sell, as was the case in *Hopkins* v. *Grazebrook* (3) no damages for loss of bargain can be recovered." Now here the defendant did know that he had not the title, for he knew that he had proposed to sell to Lord Lyveden, and that this objection had been made to his title, and that the title was not marketable. It seems to me, speaking with reserve on a point of law I am not familiar with, that he could not have deduced a good title, because he could not have deduced a title free from the assignees of the mortgagor. I speak, therefore, with reserve as to whether the plaintiff might not be entitled to recover damages for his loss of bargain, if he is entitled to recover at all.

But the principal question is, whether he has a right to recover, which depends on whether the defendant had a right to rescind

(1) 2 W. Bl. 1078.

(2) Law Rep. 6 Ex. 59, at p. 69.

(3) 6 B. & C. 31.

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the contract. Now, the learned arbitrator has found that which I think concludes the case. He says, "I find as a fact that the said rescission or attempted rescission of the contract by the defendant was not from unwillingness or inability on his part to answer or comply with objections or requisitions on the title to the said lots, or either of them." I should have thought that finding concluded the question; for the pleadings also are part of the case, and the pleas expressly state that the defendant, "being unable or unwilling to answer or comply with such objections and requisitions," rescinded the contract. But it is said that it is not necessary the rescission should proceed from his being unwilling or unable; it is enough that unwillingness or inability existed. That is ingenious, but unsound. Suppose the defendant had refused to go on with the purchase for no other reason than that he thought he could get a better price, and an action were brought against him, and it afterwards turned out that he could not make a good title; could it be said that he could then exercise his power of rescission? Clearly not. It is necessary that the unwillingness or inability should exist, and that in consequence of that unwillingness or inability he rescinds. I think, therefore, the finding concludes the case against the defendant.

But if that finding were not there, I should come to the same conclusion. It is contended that the defendant's power to rescind arises in two different ways; first, on the objection as to lot 4, that he could not make out a title to more than one-fourth, whereas he had sold an undivided third; and secondly, on the objection arising out of the conveyance to Smith, and the subsequent dealings with the title. Now first of all, had the vendor any right to rescind in consequence of the objection taken in the answer that he could only convey one-fourth, and not one-third of the property? It is clear to my mind that he had not; and for this reason: that the vendee had no power to make such an objection. It was a perfectly invalid, useless, and idle objection. He had taken it before, and taken it improperly; and it had been answered by a reference to the 10th condition, and it is found that that answer was acquiesced in. It was a futile and invalid objection; as idle as if the purchaser had said that a dot had not been put to an i; and therefore it was incompetent to him to make

it, except so far as it was an objection to the payment of the full price, as demanded in the bill.

But there is another answer to the claim of a right to rescind on this ground. It was not an objection which the vendor was unable or unwilling to answer; he certainly was not unable to answer it, because it was clearly within the 10th condition; neither was he unwilling to answer it; this is clear as a matter of fact, and it is so found by the arbitrator. I do not know whether any meaning has been judicially put on the word "unwilling;" but it certainly does not mean anything so absurd as that if the vendor says, "I would rather not, because, for certain reasons, I am glad to avail myself of an objection that you improperly make," he will be within it. It must mean an unwillingness of this character;—an objection is taken, and a man may say, "I cannot absolutely say that I am unable to answer your objection, but I can only do so at a considerable trouble and expense, and therefore am reasonably unwilling to do so." In that sense the defendant was not unwilling to answer the objection. Therefore, on these two grounds, I think the defendant was not entitled to rescind on account of the objection as to the quantity of the 4th lot.

But there is another ground on which it is said there was a right to rescind. The plaintiff sets out that the abstract of title was an improper one, and that when the true state of the title is disclosed, the vendor cannot make out a good title without getting the concurrence of the mortgagor's trustees for the benefit of creditors; and that otherwise the title would be subject to impeachment by them, on the ground that they had some equitable interest in the property. That objection also is taken by the answer. Then did that give the vendor a right to rescind? I am of opinion that it did not. In the first place, the abstract is wrong; that I take as established by the authorities; it should have contained the conveyance to Mr. Smith and the reconveyance.

Now the 5th condition states that lot 4 is sold under a power of sale contained in a mortgage made to Mr. Parker, and that the abstract shall commence with a will dated 1802. That is the title which the vendor professes to convey. Now, what does condition 3 say? "Within seven days from the day of sale, the vendors shall at their own expense make and deliver to every purchaser, or his

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solicitor, an abstract of the title of the vendors, according to these conditions, to the lot or lots purchased by him respectively." That is to say, they shall make out an abstract of the title to this lot, according to the condition, which describes them as selling under a certain power of sale. "And the purchaser shall make his objections and requisitions (if any) in respect of the title, and send the same to Messrs. Palmer, Eland, & Nettleship within twenty-one days from the day of delivery of the abstract, and all objections and requisitions which shall not be made and sent within the time specified, shall be taken to be waived, and for this purpose time shall be of the essence of the contract. And in case any purchaser shall make any objection to or requisition on the title of the respective lots, which the vendors shall be unwilling or unable to answer or comply with, the vendors reserve to themselves the option, notwithstanding they may have attempted to answer or comply with such objections or requisitions, or may have partly done so, at any time to rescind the contract for the sale of the lot or lots in respect of which such objections or requisitions shall be made, upon repaying or tendering to such purchaser or purchasers the deposit money, without interest, costs, or expenses, in full of all claims or demands for the investigation of the title or otherwise." It appears to me that, under such a condition, the vendor has only a right to rescind in respect of objections or requisitions that are made upon the title disclosed in the abstract, or objections or requisitions that arise therefrom; that is, if an objection or requisition is made, and that is answered, and the answer gives rise to a fresh requisition, then the right to rescind will apply to that also. That is the reason of the thing and the language of the condition; the condition does not apply to objections to which the abstract of the title gives no rise. Suppose the abstract of title delivered, the title accepted, and that the parties met to complete the purchase; and then it appeared that the vendor was an uncertificated bankrupt, and in consequence of that the purchaser declined to complete. Could it be contended that there would be a power to rescind under such a condition as this? The good sense of the thing, and the language of the condition, equally shew that the power is a power to rescind if an objection is taken to the title which the vendor has thought fit to disclose.

The consequence would be most unjust if it were otherwise; if the title had been disclosed, the objection would have been taken at once, and the vendor would have been obliged then to say he could not answer it. Again, if the meaning were that the vendor might rescind, whether the objection arose upon the abstract or not, it follows that the clause as to the waiver of objections, by not taking them within the time limited, also applies. But can anyone suppose that an objection which does not arise out of the abstract delivered is waived by not being taken within twenty-one days, and that if the defect is subsequently discovered it may not be taken? (1) These considerations are, to my mind, conclusive to shew that the power to rescind does not apply to objections which are found out aliunde, and cannot therefore be exercised in respect of the objection taken in the answer, that the title had been so dealt with that the vendor could not make a good title to the purchaser; for that was an objection which did not arise out of the abstract.

But there is another ground which also seems to me conclusive. The answer to the bill in Chancery was filed in September. Assuming that, upon the objection being then made for the first time, there was a right to rescind, surely the right arose then. No doubt the condition has the words "at any time;" but that means, that whenever the occasion arises for electing to rescind or not to rescind, then the vendor may rescind; but not that when the occasion arises for his determining whether he will rescind or no, he shall be at liberty to say, "I will not rescind," or do what is equivalent to an option not to rescind, and then at any distance of time afterwards say, "I will." Suppose the purchaser had asked him, on the filing of the answer, "Do you rescind or not?" and he had said, "I do not," could he afterwards rescind? No; he ought to have exercised his right when the occasion arose. But the vendor does nothing of the sort. First, the defendant in the Chancery suit having died, he writes to know the names of his executors, in order that he may revive the suit. Three months afterwards he says, "Now I have changed my mind; I will rescind." Observe the consequence; it was contended that the executors had not been put to additional expense, but at least the

(1) See *Warde* v. *Dixon*, 28 L. J. (Ch.) 315.

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deposit has been kept from them five months longer than it should have been. Why did not the defendant, knowing the objection, say within a reasonable time, that he would rescind his contract? It seems to me that upon this ground alone he must now fail.

No difficulty arises with respect to the rule in Chancery as to the right to rescind, which seems a very reasonable one; you cannot rescind a contract whilst you have a bill upon the file insisting upon it; you must first of all get rid of the bill; that is all the rule amounts to.

I will add one other observation. There is no breach in the declaration for not delivering a proper abstract; if there were, there would be no possible answer to it; and if the matter were before me as an arbitrator with power to amend, I should do so by putting in such a breach. However, in my opinion, this is not necessary to entitle the plaintiff to judgment.

MARTIN, B. As I concur in the judgment of my Brother Cleasby, and as I understand that the Lord Chief Baron agrees with it also, I shall occupy a very short time in delivering my judgment.

There are three questions for our decision. The third is, whether the plaintiff, if entitled to recover at all, is entitled to recover the costs of the Chancery suit. I think, as to that it is quite sufficient to say that it is for the Court of Chancery; if the Vice-Chancellor thought fit to refuse the costs we, at Common Law, cannot give them.

The second question is whether the plaintiff is entitled to recover damages for his loss of bargain. I should have been glad if this question had been allowed to drop. In *Flureau* v. *Thornhill* (1), which was decided a hundred years ago, it is laid down as a rule that if there was no fraud on the part of the seller, if he bonâ fide thought he had that which he proposed to sell, he was not to be held liable for any damages by reason of the loss of bargain. That case has been the subject of frequent comment; but it has been acted upon for so long that it must be taken to be law, and to possess, as I expressed it in *Bain* v. *Fother-*

(1) 2 W. Bl. 1078.

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gill (1), the force of an Act of Parliament. Now here, when the contract was entered into, the vendor bonâ fide thought he had a right to sell, and I cannot understand why the omission of certain deeds in the abstract, explained as it has been, should alter his position. The rule may be wrong; it may be an anomaly; but it is the law, and we must act upon it.

Now, with respect to the remaining question, in my opinion the defendant is entitled to our judgment, on the ground that he had a right to rescind the contract; and I rest my judgment on the decision of Vice-Chancellor Kindersley in the case of *Warde* v. *Dixon*. (2) I am of opinion that the third condition must be read according to its words and literal meaning. Then, the abstract being delivered, an objection is made to the title; as to lot 3 it is objected that the title is not made out because the market tolls, being incorporeal hereditaments, cannot be said to be situate anywhere, and therefore did not pass by Thomas Burton's devise of his hereditaments situate in Thrapston or elsewhere, which is a merely frivolous objection; as to lot 4, it is objected that the title could not be made out to more than an undivided fourth part. These are the two, and the only two objections, made to the title; and the answers made are, as to the first objection, that it is frivolous, and to the second objection that it was provided for by the tenth condition, and that there would be a proportionate abatement. This seems to have been understood by the parties, certainly by the defendant, so far as concerns the apportionment of price for lot 3. But when a bill was filed for specific performance, the then defendant, by his answer (in par. 32) admitting that lot 4 was unconnected with lot 3, except that it was comprised in the same contract, objected to complete the purchase of lot 4 at the price of 100*l.* or at all, and insisted on "all the objections to the title of each of the said lots, as a ground for refusing to complete the purchase of either of them." As far as I can see, that objection, which was raised for the first time, never was disposed of. That being so, the decision of Vice-Chancellor Kindersley in *Warde* v. *Dixon* (2) is directly in point. It is true the Vice-Chancellor goes on to say that the costs of the suit must be paid by the vendor as a condition precedent to his

(1) Law Rep. 6 Ex. 59.

(2) 28 L. J. (Ch.) 315.

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rescinding, and I have no doubt that the rule is correctly stated, and is a very proper one; but it is no part of the bargain or contract; it is merely a rule which the Court imposes as a matter of practice in the administration of equity. Therefore, on the authority of Kindersley, V.C., it is competent to the vendor, in such a case as this, to say, on the objection being made, "I am unable to answer it, and I therefore rescind the contract." This is so by the express words of the contract, and I cannot understand the argument to the contrary that has been addressed to us. In my opinion the defendant is entitled to judgment.

BRAMWELL, B. I wish to add a reference to the case of *Pilcher* v. *Rawlins* (1); I refer to it upon the point as to the deeds omitted from the abstract.

KELLY, C.B. I also think that the defendant is entitled to our judgment. The great question in the case is, whether the defendant was entitled to rescind the contract at the time when he purported to rescind it. That depends entirely on the 3rd condition, and upon what was done under it. Now here an abstract was delivered, and two objections were made upon it. The first, that the defendant was not entitled to one-third, but only to one-fourth, of lot 4; the other, that no sufficient title was made out in the abstract to lot 3, which comprised certain market tolls. Upon these two objections being taken, certain communications took place between the parties which resulted in the objection as to lot 4 being withdrawn, by reason of a provision in the 10th condition that if any mistake were made in the quantity of lot 4 it should not annul the sale, but the difference in value should be compensated for. This was conceded, and the parties agreed to put an end to the objection, and that the purchase-money should be reduced to 75*l*. The objection as to the 3rd lot remained unanswered, and in this state of things, although the defendant would no doubt have been entitled, by reason of the objection as to lot 3, to say, "I am unable or unwilling to answer it, and I elect to rescind," yet inasmuch as the objection as to lot 4 had been put an end to, and as regarded lot 3 he thought he could make

(1) Law Rep. 11 Eq. 53; since reversed, Law Rep. 7 Ch. 259.

out a sufficient answer, and in fact make a good title to that lot, he did not rescind the contract, but proceeded to call upon the purchaser to complete it by accepting the title as he had set it forth in the abstract, and on the purchaser's refusal, he filed a bill to enforce specific performance. In his answer to that bill the purchaser, admitting that the objection as to lot 4 had at one time been put an end to, and that it was to be conveyed to him as on a separate contract for the price of 75*l.*, says in express terms, in par. 32, that he is "not willing to complete the purchase of lot 4 at the price of 100*l.* or at all, either with or without prejudice to any question as to lot 3." In other words, he withdraws altogether his acquiescence in the answer produced and the arrangement proposed by the vendor, and insists upon all the objections which he can make as to each lot as a ground for refusing to complete the purchase of either of them. He therefore renews and repeats the objection as to lot 4, and the question is, where is anything in the terms of the condition to preclude the seller from rescinding under it, on the ground that he is not able or not willing to answer the objection? Is there anything to prevent him from saying, "It is true I did not see fit to rescind the contract when you made the objection as to lot 4, but, on the contrary, proposed and made an arrangement in lieu of rescinding, which you accepted, but now that you have revived the objection, and are actually, within the strict terms of the condition, insisting on an objection as to lot 4, I have the right of rescinding under that condition, and I do rescind accordingly." I am unable to conceive what is to be said against the right of the defendant at that time and under those circumstances to rescind. It is said that he has lost the right to rescind because he did not exercise it at the time the objection was made; but the answer is that the objection was agreed to be waived, and was thus for the time put an end to.

Then it is further said by the plaintiff, "You have filed a bill for specific performance against me, and therefore you are not entitled to rescind; you call upon me to act upon the contract, and at the same time claim to rescind and put an end to it." But the state of circumstances under which the seller was entitled to rescind had, at the time when the bill was filed, altogether

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ceased to exist, but was now renewed and revived when the purchaser by his answer insisted on the objection. Then we are met with a difficulty arising out of the practice of the Court of Chancery, that the seller cannot, while his bill for specific performance is pending, put an end to the contract; he must first dismiss his bill with costs. But the whole meaning and essence of that rule (which is a very reasonable rule) is this: "You cannot be acting on the contract and assuming it to exist, and at the same time exercising a right to put an end to it by rescinding it." Now the seller has taken all the means in his power to obtain a dismissal of the bill with costs. Unfortunately before he could do so the purchaser, Mr. Leete, dies. Whether or no the seller was aware of the effect of this, he at all events proceeded to take steps for dismissing the bill, and obtained an order that the bill be dismissed with costs, but as the defendant in the suit had already died, the order, it seems, was inoperative, and it became necessary to take some further steps to comply with the rule in question. The plaintiff in the suit, however, offers at once to pay over the costs to whoever might be the executor of the deceased defendant; he does all he can to give effect to the rule of the Court; but the other party will not accept his offer; they say "No, we will insist on the literal terms of the rule being conformed to, that is, upon the bill being formally dismissed with costs, and inasmuch as you cannot do this without reviving the suit so as to have a party to whom the costs may become payable, you must take steps for that purpose." Then the now plaintiff obtains an order that unless the plaintiff in the suit revives it within a certain time the bill shall be dismissed; and as the plaintiff in the suit would not take any further step in the business, the order became absolute and the bill was dismissed, but without costs. The object of the rule is now answered; the suit for specific performance is at an end; and therefore the parties are remitted to their original rights. Then this being an objection made to the title, it conferred on the now defendant a right to rescind the contract if he was either unable or unwilling to answer it. He says he is either unable or unwilling, and accordingly rescinds the contract.

Then we are met with another difficulty. It is said that the award finds that, although in truth the defendant has purported to

rescind the contract, he did not do so from any unwillingness or inability on his part to answer or to comply with the objections or requisitions. But I think it is wholly immaterial what was the cause of his unwillingness or inability; it is enough that the contract says in plain and clear terms, that if inability exists, if unwillingness exists, the defendant shall be at liberty to rescind. He says "Whatever may be the case as to inability, on which a question of law may arise whether the objection was valid or invalid, I have a right to rescind, for the objection being made by the answer, I am unwilling to attempt to answer it, and I do accordingly rescind." In my opinion he has a perfect right to do so.

But then we are met with a further difficulty. In his answer the purchaser, besides renewing and bringing again into existence his previous objections, raises a further objection, which is in substance this:—He says, "You agreed to deliver an abstract of title within a certain time, in which the true state of the title should be set forth; you have not done so, but have delivered an abstract in which you have omitted to state certain conveyances of which you well knew the existence, and which were material and necessary to make out a good abstract within the meaning of the condition." And it is said thereupon that the right to rescind is put an end to. The defendant meets this in two ways. First, he says, "This does not deprive me of my right to rescind, but it gives me another ground on which I am entitled under the condition to rescind; you make a fresh objection, which I am unable or unwilling to remove." This is met by an answer as to which, if it had stood alone, I am not prepared to say that it would not be a sufficient answer. It is this,—"the objection that gave you a right to rescind is an objection arising upon the abstract which you have delivered; but this objection does not so arise, but is wholly collateral, and is one that entitles me to say that you have not performed your contract to deliver an abstract." Now when we look at the literal terms of the condition, the objection is certainly within it, for the condition says, "in case any purchaser shall make any objection to the title of the respective lots, which the vendors shall be unable or unwilling to answer," the vendors reserve to themselves the right to rescind. This is certainly an objection to the title of a portion of

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the property which the vendor is unwilling or unable to answer; but the plaintiff insists that, when you look at what immediately precedes these words, it means an objection to the title in the abstract. I am not sure that this is not the intention of the parties. But supposing it to be so, then comes this question: if by reason of the objection made in respect of lot 4, which the defendant is unable or unwilling to answer, he acquires a right to rescind, how can that right be taken away from him by making the other objection, whether within the condition or not? The purchaser has taken an objection applying to a lot included in the contract; if the vendor is unable or unwilling to answer it he is entitled to rescind the contract; and how can this right be taken away on account of another objection being made as to which he would not have that right?

I think, therefore, looking at the matter every way, that the case is very clearly brought within the terms of the condition.

Lastly, it is said that the rescission was not made within a reasonable time. It is very difficult to say in a case of this nicety what is a reasonable time. The objection was made on the 3rd of September,—that would be in the middle of the long vacation; it was an objection of such a nature that the seller was entitled to delay acting upon it until he could obtain good legal advice; this would naturally bring him to the beginning of November, and from that time there was about a month in which to obtain advice and take action upon it, when the defendant in the suit died, and so the matter goes on till February. Looking at all the circumstances of the case, I am not prepared to say that the rescission was not within reasonable time.

Upon the whole case, then, I do not see that in any one point the vendor's right to rescind is at all affected by anything that has taken place.

Then, with regard to the other two points: whether the plaintiff is entitled to damages for loss of bargain and the costs of the Chancery suit, I have already expressed my opinion in agreement with my Brothers Martin and Cleasby. I am of opinion, therefore, that the defendant is entitled to our judgment.

Judgment for the defendant.

Error was brought on this judgment, and the case was argued before the Court of Exchequer Chamber, on

May 10, 1873. *Manisty, Q.C.* (*Speke* and *C. E. Hawkins* with him), for the plaintiff, followed the same line of argument which had been taken in the court below, and, in addition to the cases then referred to, cited the following. On the point as to the defendant's right to rescind, *McCulloch* v. *Gregory* (1); and on the right to damages for loss of bargain, *Bain* v. *Fothergill* (2); *Robinson* v. *Harman* (3); *Lock* v. *Furze* (4); *Engell* v. *Fitch.* (5) He did not contend for the plaintiff's right to recover the costs in Chancery.

Karslake, Q.C. (*Kemplay, Q.C.*, and *Bagshawe* with him), argued for the defendant, and cited the following additional cases. On the first point, *Duddell* v. *Simpson* (6); *Mawson* v. *Fletcher* (7); *Alcock* v. *Connop* (8); on the second point, *Sikes* v. *Wild.* (9)

Cur. adv. vult.

June 26. The following judgments were delivered:—

GROVE, J. In this case I agree with my Brother Bramwell, who in the court below considered the plaintiff entitled to judgment.

The only questions upon which I think it necessary to enter, are those arising upon the construction and application of the 3rd condition of sale. The Lord Chief Baron was at least doubtful whether "any objection which the vendors shall be unable or unwilling to answer," does not mean an objection to the title of which the abstract is furnished. He says, "I am not sure that this is not the intention of the parties." My Brother Cleasby also relies much on the objection to lot 4 being continued as a valid objection in the answer to the bill in Chancery, and after discussing the question of reasonable time, he says, "That old contract the

(1) 1 K. & J. 286; 24 L. J. (Ch.) 246.
(2) Law Rep. 6 Ex. 59.
(3) 1 Ex. 850; 18 L. J. (Ex.) 202.
(4) Law Rep. 1 C. P. 441.
(5) Law Rep. 4. Q. B. 659.
(6) Law Rep. 1 Eq. 578; Law Rep. 2 Ch. 102.
(7) Law Rep. 6 Ch. 91.
(8) Weekly Notes, 1872, p. 87.
(9) 4 B. & S. 421; 32 L. J. (Q. B.) 375.

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defendant in this suit says he is not bound to perform, because of this objection, which was an objection made under the old contract, and which was a valid and subsisting objection. The vendor was therefore entitled to rescind." The judgment of my Brother Blackburn proceeds, as will be seen, upon a different ground.

Now the 3rd condition of sale is as follows:—[The learned judge here read the 3rd condition.] By this an abstract of the title of the vendors to the lot or lots purchased respectively, is to be delivered within seven days from the sale, and the purchaser shall make his objections and requisitions (if any) in respect of the title and send the same within twenty-one days of the delivery of the abstract. Now, the title and the abstract so far obviously mean those previously mentioned, that is, the abstract delivered within seven days, and the title therein disclosed; the objections and requisitions contemplated refer (the contrary is not contended) to the title so disclosed, and all objections and requisitions not made within the time specified shall be taken to be waived. These cannot of course apply to a title unseen and unknown. Now comes the sentence on which the question arises: ".and in case any purchaser shall make any objection to or requisition on the title of the respective lots which the vendors shall be unwilling or unable to answer," &c. Is "any objection or requisition on the title," in this sentence to have an entirely changed meaning, and are the words "the title" to be applied, not to the title hitherto referred to, viz., that of which the abstract has been delivered within seven days, but to another, and, taken as a whole, a different title, which the vendor knows, but the purchaser does not, a title which was not found out by the objections or requisitions, and whose disclosure did not in any way flow from them, but which was disclosed after the whole period of the seven days, the twenty-one days, and any further time occupied in discussing the objections and requisitions, and any matters arising out of them, has elapsed? Would any purchaser so read the requisition, not knowing, and having no reason even to guess that there exists such another title? The condition goes on to give power at any time to rescind the contract for the sale of the lot or lots "in respect of which such objections or requisitions" shall be made. Are "such objections and requisi-

tions" in this sentence, not the objections referred to in the early part of the condition, but a new objection, necessitated by a new and objectionable title, of which the purchaser, when he made his objections and requisitions, was, from the vendor's default, ignorant? After the expense and delay of investigating the first title, by which he may have lost the opportunity of a better investment, by the stringent terms imposed by the vendor he is to recover nothing but his naked deposit, the interest of which he has also lost; he is to begin a new investigation at his own cost, or give up the whole. Are the new objections and requisitions to be limited to twenty-one days, though the vendor has not as to the second abstract been limited to the seven days? and how much, if any, of those previous conditions are to be applied to these new investigations? It seems to me the matter is plunged into a sea of difficulties by such a construction; whereas, the simple ordinary construction, reading the words "the title" to have the same application in the early and the later part of the condition, and the words "objections" and "requisitions" to have the same application, is perfectly intelligible, free from difficulty, and certainly sufficiently favourable to the vendor, who has used his own words in imposing the condition, and against whom, if in any conceivable case, the maxim "fortius contra proferentem" should apply.

Then, is the vendor entitled to rescind because the purchaser has repeated his objection to lot 4 in his answer to the bill in Chancery? So far from electing to rescind upon the objection taken in the first instance to lot 4, the vendor, by filing a bill for specific performance, shews that he pays no regard to that objection, and is not either unwilling or unable to answer it; he has answered it, and insists on the completion of the purchase. He therefore manifestly does not rescind in consequence of the objection, but in consequence of the new difficulty which has arisen from defects in a title not disclosed in pursuance of the conditions of sale.

The vendor, moreover, in his bill insists on the full price for lot 4, although it is admitted that the extent of the property was substantially less than that contracted for. It is true that the purchaser, having discovered the mistake in the abstract, and being asked for the full price of lot 4, seems to repeat, in addition

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to his new objection, his previous objections in general terms. At least the latter part of the 32nd paragraph would probably be so construed; though this is not quite clear when the paragraph is read in conjunction with paragraph 31, which points out the new objection to lot 4; and this (with the objection to the demand of the full price for lot 4 and the remaining parts of the answer) may be what is referred to, and the purchaser may mean by "all the objections," all those here urged, and when he uses the words, "or at all," he may mean "or at all, now that the more serious objection is discovered." Assuming, however, these paragraphs to be construed as a repetition of his old objections, together with the new ones, I cannot see that this throws the whole matter back upon the old conditions, which, as I read them, do not apply to the new state of things; and upon the old objections, on which the vendor has, in the strongest mode open to him, elected not to rescind. I cannot help thinking that the learned arbitrator took this view when he found as a fact that "the said rescission, or attempted rescission of the contract by the defendant was not from unwillingness or inability on his part to answer or comply with objections or requisitions on the title to the said lots, or either of them." If the finding be so interpreted, it shuts out from consideration the renewal of the old objections, and if it be read more generally, I agree with what my brother Bramwell has said as to its force, and think that practically it decides the question.

It is quite unnecessary I should go more at length into this question; I should probably only repeat many of the arguments of my Brother Bramwell; and it is needless to enter upon the other questions, as the large majority of the Court are of opinion that the defendant is entitled to judgment.

BLACKBURN, J. (1) In this case the plaintiff's testator purchased from the defendant, who was sole surviving trustee under the will of William Parker, at an auction, two lots, 3 and 4, of real property. Lot 3 was knocked down to him at 450*l.*, and lot 4 at 100*l.*; but he signed one contract for the purchase of the two lots for 550*l.* subject to the conditions of sale.

(1) Keating, Brett, Archibald, and Honyman, JJ., concurred in this judgment.

Those parts of the conditions material to the question before us were as follows:—

[The learned Judge here read the 3rd, 5th, and 10th conditions as above stated.]

The plaintiff's testator paid a deposit of 10*l.* per cent. on the purchase money of both lots. This has been returned to his executors, but without interest or any other compensation. The questions in the case are, whether the plaintiff is entitled to any, and if any, what further compensation? The majority of the Court below were of opinion that he is not entitled to any further compensation, and if that opinion is right, it becomes unnecessary to consider any other point.

This depends on whether, on the true construction of the conditions, the defendant had an option under the circumstances that have occurred to rescind the contract, and if he has in due time exercised that option. My Brother Bramwell, in the Court below, thought that the defendant failed in making out either position; but, on considering the case, I have come to the contrary conclusion, and consequently think that the judgment below should be affirmed.

In Dart's Vendors and Purchasers, 4th ed. vol. i. p. 115, it is said: —"If any other condition refer to 'the delivery of the abstract, this in any question as to time, will be held to be the delivery of a perfect abstract, i.e., an abstract as perfect as the vendor could furnish at the time of delivery; although it may be an abstract of a defective title; and if it contains with sufficient fulness the effect of every instrument which constitutes the title, it will be deemed to satisfy the condition, and time will begin to run against the purchaser as from the date of its delivery; and an abstract, as delivered, is presumed to be perfect, unless the contrary is shewn." For this various decisions are cited, which seem to me to bear out his positions, which I think correct.

The defendant here delivered an abstract of the title to lot 4, which was perfect in the above sense down to the time of the mortgage to Parker. But it now appears that Collier, the mortgagor to Parker, had, after the mortgage, conveyed all his estate (including therefore the equity of redemption in this property) to Parker and Castle, as trustees, for the benefit of his creditors; that Parker, in professed exercise of his power of sale, appointed the premises to one Smith, and Praker and Castle, as trustees,

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conveyed the equity of redemption to Smith; that Smith was a mere trustee for Parker, had signed a declaration of trust in his favour, and subsequently conveyed the estate to Parker. These facts, and the deeds which evidenced them, were all in the knowledge of the defendant, but he "intentionally, but bonâ fide," omitted these instruments from the abstract, as it was supposed they did not affect the title. This omission was enough to prevent the abstract from being a perfect one within Mr. Dart's definition, and consequently the purchaser had a right to raise any objection arising on the matters omitted, though after twenty-one days from the delivery of the imperfect abstract.

On the delivery of the abstract the solicitor of the plaintiff's testator made a perfectly frivolous objection to the title to lot 3.

He also made a well-founded objection to the title to lot 4, as disclosed on the abstract, being only a title to one-fourth of the cottages instead of to one-third. The vendors offered, under condition 10, to make an abatement of one-fourth of the price, and convey one-fourth of the cottages for 75*l.* instead of one-third for 100*l.* The purchaser, so far as this lot was concerned, seems to have acceded to this, but persisted in his unfounded objection to lot 3, and declined to take and pay for lot 4 unless he could get both. Thereupon the vendor filed his bill in equity for a specific performance of the contract by the testator, and I certainly think that this was a distinct declaration of his option not to rescind on account of any objection hitherto made.

The equity draftsman who prepared the bill, framed it as if there was a title made out to the original lot 4, namely, one-third of six cottages sold at the price of 100*l.*, and prayed that the purchaser might be required to take lot 4 at 100*l.* (unless that was already considered as done), and lot 3 for 550*l.*, and pay 450*l.* or 550*l.* as the case might be.

On the 23rd of September, 1868, J. G. Leete filed his answer to this bill. [The learned Judge here read par. 10, 31, and 32 of the answer as set out above, and proceeded.]

On the 2nd of December, 1868, the plaintiff's testator died. On the 26th of January, 1869, the defendant's solicitors wrote, requesting particulars of the probate of the will, "in order to revive the suit, which we will do at once;" which I think shews conclusively that they had not then resolved to exercise their

option to rescind if they still had it. On the 12th of February, 1869, they wrote: "We shall rescind the contract and present petition to dismiss bill on grounds which we will explain in a future letter," which I think shews conclusively that they then exercised their option to rescind if at the date of that letter they still had such an option; nothing has occurred subsequently to undo this rescission, if then effectual.

The question therefore seems to me to be whether the vendor on that day had an option to rescind under the third condition. It appears to have been, to some extent at least, the reason of the judgments of the majority of the Court below, that the vendor had a right to rescind because the purchaser objected that the vendor's title extended only to one undivided fourth part of the cottages instead of to one undivided third part. That objection had been made long before: it had been met by a reference to the tenth condition, and supposing that the vendor could ever have rescinded on that ground he had determined his option to do so by demanding a specific performance of the contract to take lot 4, as it really was, for 75*l*. But that could easily have been rectified by an amendment of the bill. And I agree with my Brother Bramwell that the finding of the arbitrator is that the vendor did not, in fact, rescind on this ground. And I do not see how, on these facts, the arbitrator could have come to any other conclusion. But the objection (raised for the first time in the answer) that the abstract was defective in not shewing the deeds was (at the least) a plausible one: and the purchaser was not too late in raising it. If the raising of that objection gave the vendor an option to rescind, he was entitled to a reasonable time to take advice and consider what he would do. I cannot think that the delay till the 12th of February was so great as to lead us to the conclusion that he had then already determined his option (if he had one) by resolving to go on. At that date the letter shews that he determined to rescind (if he could) on the ground that he was unable or unwilling (or both) to answer this objection.

My Brother Bramwell (as I understand his judgment) thinks he had no such option, because he construes the third condition as meaning that after the delivery of an abstract de facto, though not a perfect abstract, objections to the title as appearing on the

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abstract, and only such objections, are waived, if not made within the twenty-one days, and that the option to rescind in the latter part of the condition only applies to such objections made, or at least commenced, within the twenty-one days, which would otherwise be waived. If I agreed with him in this construction of the condition I should think the judgment below wrong. But I do not agree in this. The intricacies of title, according to the law of real property, are such that a vendor who bonâ fide thinks he has a good title, and who honestly discloses a perfect abstract, may unexpectedly find that, owing to something not appearing in his abstract, and of which he had no knowledge, he has no title at all, or one which can only be made marketable at a great expense. And it is to meet such a case that the provision in the condition is inserted, which, I think, must be construed to mean that in case any objection to the title, whether as appearing in the abstract or otherwise, is made, the vendor may have the option to rescind.

It is objected that this construction leaves it open to a dishonest vendor to deliver an abstract concealing the defect, and take the chance of the blot not being hit; that he may with impunity put the purchaser to a great deal of expense before he discovers the blot, and then the vendor can rescind. I do not think he can do so with impunity. The purchaser, on a count framed in tort, alleging that the vendor represented to him that the abstract was a perfect abstract, which was false to his knowledge, might recover any damages resulting from his being induced to act on that representation; and on a count for the breach of the vendor's contract to deliver a true abstract, he might recover such damages as resulted from the breach: see *Steer* v. *Crowley*. (1) But it would be a good answer to the action of deceit, and reduce the damages to nominal damages in that on contract, if it were to appear that the purchaser was well aware of the blot all the while, and went on intending to get costs from the vendor; for then the damage would result, not from the false representation or breach of contract on the part of the vendor, but from the cupidity of the purchaser or his attorney.

It is enough in the present case that no attempt has been made to sue in either of the ways suggested. The facts found in the

(1) 14 C. B. (N. S.) 337; 32 L. J. (C. P.) 191.

thirteenth paragraph of the case (1) afford good grounds for doubting whether the plaintiff could have recovered damages if such an attempt had been made, or at all events suggest a reason why it was prudent in his advisers not to try. I therefore think the judgment should be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Milne, Riddle, & Mellor.*
Attorneys for defendant: *Palmer, Eland, & Nettleship.*

[IN THE EXCHEQUER CHAMBER.]

BLAMIRES *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

June 27.

Railway Company—Negligence—Communication between the Passengers and the Company's Servants—Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *s.* 22.

The Regulation of Railways Act, 1868, s. 22, enacts that "every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping," means of communication between the passengers and the servants of the company in charge of the train:—

Held, that the section applies to every passenger train which is intended to travel more than twenty miles without stopping.

In an action for personal injuries, brought against a railway company by a passenger in a train which was within the meaning of the Act, it appeared that there were no such means of communication as were prescribed by the Act; it also appeared that the adoption of such means of communication had been recommended by the Board of Trade, and that they were in fact adopted and used by other railway companies, and also by the defendants themselves in other trains. Some evidence was also given that if such means of communication had existed, the accident might have been prevented:—

Held, that in determining whether, in the case of a passenger train intended to run more than twenty miles without stopping, the company was guilty of negligence in not providing means of communication between the passengers and the company's servants, the provision contained in s. 22 of the Regulation of Railways Act, 1868, was to be taken into account.

Quære, whether this would be so in the case of a train not intended to run twenty miles without stopping.

ACTION for personal injuries tried before the Lord Chief Baron at the Manchester Summer Assizes, 1871.

(1) Ante, p. 255.

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The plaintiff was a passenger on the defendants' line on the 7th of June, 1870, by an excursion train which left Cleckheaton at 5 a.m., and was timed to arrive at Blackpool at 8.15 a.m.

The plaintiff travelled in the seventh carriage from and including the guard's van. Shortly after passing through Blackburn station a severe shock was felt in that carriage, described by one of the witnesses to have been as if the end of the carriage had been lifted up and suddenly let fall. A short distance before reaching Pleasington station a more severe shock was felt, which threw the passengers off their seats. After two or three minutes a third shock was felt, followed by continuous jerks, and then the train separated between the seventh and eighth carriages. The seventh carriage was thrown down the embankment, and the plaintiff and several other persons were severely injured. These shocks were also felt in all the carriages behind the seventh.

The accident was caused by the breaking of a tire across a rivet hole.

The plaintiff gave evidence to shew negligence in the defendants in respect of the breaking of the tire; and the defendants gave evidence to the contrary.

In addition to this the plaintiff relied on the want of communication between the passengers and the guard and engine-driver, and between the guard and the engine-driver; and, in support of the view that the want of such communication constituted negligence in the defendants, referred to the recommendation of the Board of Trade set out below, and to 31 & 32 Vict. c. 119, s. 22, which enacts that, "Every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping, such efficient means of communication between the passengers and the servants of the company in charge of the train as the Board of Trade may approve," and imposes a penalty of 10*l.* on any company which makes default in complying with the section, and of 5*l.* on any passenger who makes use of the means of communication without reasonable and sufficient cause.

The facts proved on this part of the case were as follows:—

There were no means of communication between the passengers and either the guard or the engine-driver in any of the carriages;

and several witnesses in different carriages proved that on the second shock occurring they looked for such means of communication; that if there had been any such they would have used them, and that there was then time to have stopped the train before the accident happened; but, on the evidence given, it was denied by the company that this could have been done.

Neither were there any means of communication between the guard and the driver, except by the guard's applying the break, which would check the train, and in that way warn the driver that something was wrong.

The guard did apply the break as soon as he became aware of the accident, and brought the hinder part of the train to a stand in a distance of about 200 yards, but it appeared that he was not aware that anything was amiss until the third shock occurred.

According to the time-table delivered to the guard of the train, the train was to pass several stations without stopping, and if it had done so it would have run a greater distance than twenty miles without stopping; but some evidence was given by the defendants that general instructions had been issued to the servants of the company not to travel more than twenty miles with excursion trains without stopping, without regard to the time tables. The train had not in fact at the time of the accident travelled any distance of twenty miles without stopping.

It was proved that various modes of communication between the passengers and the guard were known and were in use on other lines and on the defendants' line, and that it was usual for the defendants to furnish such means of communication in through trains, but not in excursion trains.

It was also proved that the Board of Trade had issued a recommendation to all the railway companies in the following terms:—"There should be means of inter-communication between a guard at the tail of every passenger train and the engine-driver, and between the passengers and the servants of the company."

Upon the question whether the train came within the meaning of the Act, the Lord Chief Baron directed the jury that it depended, not on whether it passed over twenty miles without stopping, but on whether, taking together the time tables and the instructions

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which the witnesses spoke to, the persons in charge of the train were instructed, and that it was their duty, and that they knew it was their duty, to stop once at least in every twenty miles.

With respect to the bearing of the Act upon the question of negligence the learned judge directed the jury as follows: "But even if the train were within the Act of Parliament it appears to me to be of very little importance in this case. First for this reason. It is not every disobedience to an Act of Parliament that will constitute negligence in a railway company so as to make the railway company responsible for accidents of this nature. It is only if the duty imposed by the Act of Parliament be such that the breach of it, the neglect of the duty, was likely to conduce to an accident of this nature, that the Act of Parliament would have any effect upon it; and if there had been any duty imposed on the company, any precaution which they ought to have taken, and which they have failed in taking, any duty which they have not performed, and the non-performance of which led to this accident or was likely to conduce to this accident, then, whether there was an Act of Parliament or not, that breach of duty is worthy of your consideration to see whether you can find negligence."

In answer to questions put to them by the Lord Chief Baron the jury found that the time-table and the instructions taken together were not to the effect that with all excursion trains the drivers were to stop within twenty miles; that the want of communication was negligence in the defendants; that the want of communication between the passengers and the railway company's servants caused or materially conduced to the accident; that the want of communication between the guard and the driver caused or materially conduced to the accident; and generally that the accident was caused by the negligence of the company.

But the jury found that there was no negligence in the company in respect of the tire, the breaking of which caused the accident, and they gave a verdict for 350*l*.

The defendants in Michaelmas Term, 1871, applied for a rule for a new trial, on the ground that the learned judge misdirected the jury, by telling them that the railway train in which the plaintiff was a passenger came within the Regulation of Railways Act, 1868, s. 22; and that there was evidence of negligence.

This rule was refused, and the defendants, by leave of the Court, appealed.

Holker, Q.C. (*Edwards* and *Cowie* with him), for the defendants, contended that a train could not be brought within the section, unless it actually travelled twenty miles without stopping; that there was no sufficient evidence that the existence of means of communication was a valuable precaution, or one that the defendants ought to have adopted, or that it would have prevented the accident; and that no regard could be paid on this question to the provisions of the Act of Parliament or the recommendation of the Board of Trade.

Herschell, Q.C. (*Baylis* with him), for the plaintiff, was not called upon.

BLACKBURN, J. The question is, whether in this particular case, and under these particular circumstances, there was evidence of negligence to go to the jury; and I am of opinion that there was. I think the construction put on the Regulation of Railways Act, 1868, by the Chief Baron was the correct one. The Act (s. 22) says, that "every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping," means of communication between the passengers and the company's servants in charge of the train; and the Chief Baron directed the jury that it was necessary to see, first, whether the train carried passengers, and next, whether it was started with the intention of going for more than twenty miles without stopping. If the construction contended for by the defendants were correct, it would make the duty of the railway company to provide means of communication depend, not on what the company intended, but on what the engine driver might happen to do after the train had started. The jury have found that the train was not intended to stop within twenty miles.

Then it is said, that the breach of duty must be such as to conduce to the accident. The jury say it did; but it is contended that there was no evidence to support their finding on this latter point. The question is, not whether their verdict was against the weight of evidence, but whether it was the duty of the learned judge to

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withdraw the question from their consideration. Now we have not to decide whether, if the Act did not apply, there was sufficient evidence to shew that it was the duty of the company to provide means of communication, whether such an obligation was cast upon them by the common law duty to take reasonable care of their passengers; the Act does apply to this case; and I wish to leave it open for future decision what may be the duty of companies in cases where the train is intended to stop at shorter distances than twenty miles, and what may be the effect of the Act in that case; here the two circumstances coincide, that the legislature has directed a precaution to be taken for the protection of passengers, and that the jury are satisfied that if this precaution had been taken it would have prevented the accident. Then is there reasonable evidence on which the jury might find that the use of this precaution would in fact have prevented the accident? [After reviewing the evidence the learned judge proceeded:—] I am far from saying that if I had been on the jury I should have found that the existence of means of communication would have produced this beneficial effect; but I do not see how the learned judge could have withdrawn the question from the jury.

Then as to the bearing of the Act, we must, as I have said, take the two things into consideration: first, this train was run under such circumstances that the Act applied to it, and created a duty on the defendants to provide means of communication; and then, in determining whether the want of means of communication may have conduced to the accident, the fact must not be thrown out of consideration, that the legislature have thought fit to enact that such means of communication shall exist.

KEATING, J. I am of the same opinion.

BRETT, J. I agree; but I wish to express exactly the ground of my judgment. This is not an action for a penalty, nor is it founded on a breach of the Act of Parliament, and consequent injury to the plaintiff. It is an action for negligence, and the plaintiff is bound to prove that the railway company have been guilty of doing something which a railway company of ordinary care would not do, or omitting to do something which a railway company of ordinary care would do. Now the evidence is, that

this was a train which was intended to go for a longer distance than twenty miles without stopping; therefore it was a train within the Act of Parliament; and I think the Chief Baron was right in so holding. But, further, there is evidence that this precaution, which is enacted for trains going a longer distance than twenty miles without stopping, was known to, and practised by, railway companies of ordinary care. It is right to use the Act as some evidence of what is due and ordinary care under the circumstances of this case; and that is the way in which the Chief Baron directed the jury to use it; it is some evidence that, where a train is to go more than twenty miles without stopping, it is a proper precaution that means of communication should exist between the passengers and the guard. But also there was evidence that not only was this precaution enacted, but that it was in fact a habit with railway companies to carry the enactment into effect. And taking into consideration these two facts, they together amount to evidence on which the jury were entitled to find that something was not done which railway companies of ordinary care would do.

GROVE, J. I am of the same opinion. Negligence must depend very much on the state of knowledge at the time. If a particular precaution has not been hitherto known or used, or if its use is obscure, the omission of it is not negligence; but if it is used to any considerable extent, that changes the case, and makes the omission some evidence of negligence. Supposing that, instead of an Act of Parliament, the Board of Trade had issued a notice to all railway companies, pressing upon them the adoption of this precaution, that evidence could not have been withheld from the jury; it would shew that the company had been warned of an efficient means of preventing accidents. Thus the Act is important evidence, as shewing, not merely that the means existed, but that it was known, and was sanctioned by the legislature.

ARCHIBALD, J. I am of the same opinion.

Judgment affirmed.

Attorneys for plaintiff: *Torr, Janeway, & Tagart.*

Attorneys for defendants: *Clarke, Woodcock, & Ryland, for T. A. & J. Grundy & Co., Manchester.*

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June 2.

MARCHANT *v.* THE LEE CONSERVANCY BOARD.

Pension—Grant of Annuity—Resolution not under Seal—Power to vary Pension—Lee River Navigation Improvement Act (13 & 14 *Vict. c. ix.*).

By the Lee River Navigation Improvement Act, 1850, s. 76, it is enacted that "it shall be lawful for the trustees [of the River Lee] from time to time to pay and allow to any servant whose services may . . . no longer be required, such annuity or other allowance as . . . may in the judgment of the trustees be reasonable and proper, and the trustees may, from time to time, pay and allow such annuity or allowance out of the moneys which may come to their hands," by virtue of certain recited Acts and of that Act. The trustees, acting under this section, by resolution not under seal, granted to a retired servant an annuity of 300*l.* a year:—

Held, that the annuity so granted could not after the servant's retirement be reduced in amount.

Cited in Re Ch Rly Co

SPECIAL CASE:—The plaintiff sought to recover 37*l.* 10*s.* from the River Lee Conservancy Board, as due on account of a retiring pension granted to him by the trustees of the river Lee. The facts are as follows:—By the Lee Navigation Improvement Act, 1850 (13 & 14 Vict. c. ix.), after reciting various prior Acts for the management of the river Lee and the improvement of the navigation thereof, and that certain persons qualified as therein mentioned had been from time to time appointed trustees for executing those Acts, it was, by s. 3, enacted that the trustees should be a body corporate for the purpose of carrying out the provisions of the recited Acts and of that Act. By s. 7 the Commissioners Clauses Act, 1847 (except s. 54 and certain sections relating to the qualification, &c., of the commissioners and to the formation of a sinking fund), was incorporated. By s. 71 power was given to the trustees to determine the amounts of tolls and the places at which they are to be paid to collectors appointed by the trustees, the amounts, however, not to exceed the limits fixed by the recited Acts; and by s. 76 it is enacted that "it shall be lawful for the trustees from time to time to pay and allow to any officer or servant of the trustees whose services may from any other cause than that of misconduct be no longer required by the trustees, such annuity or other allowance as having regard to length of service and all the other circumstances of the case may, in the judgment of the trustees, be reasonable and proper; and the

trustees may from time to time pay and allow such annuity or allowance out of the moneys which may come to their hands by virtue of the powers and provisions of the recited Acts and this Act."

On the 1st of February, 1865, the plaintiff, who for forty years had held the office of clerk to the trustees, resigned. In his letter of resignation he applied for a retiring pension, and at a meeting of the trustees held on the 11th of March, 1865, the following resolution was duly passed and signed by the chairman: "That the resignation of Mr. Marchant, senior (the plaintiff), be accepted, and that a retiring pension of 300*l.* per annum be granted to him during the remainder of his life." The pension was regularly allowed and paid by the trustees until their duties and powers were transferred by the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv.), to the defendants, who were thereby incorporated under the name of the Lee Conservancy Board. By s. 62 of the last-mentioned Act, all the property, authority, rights, and interests of the trustees were vested in the defendants, and it was thereby also provided that the same should be used and enjoyed by the defendants, "in the same manner and to the same extent, for the same purposes, and subject to the same obligations," as they had been used and enjoyed by the trustees. By s. 129 certain additional tolls specified in the schedule were authorized.

From the date of the final establishment of the board on the 2nd of April, 1869, to the 25th of December, 1871, the retiring pension of 300*l.* per annum was paid regularly every quarter to the plaintiff by the defendants, and the payment of it was duly entered and allowed in the accounts kept under the Commissioners Clauses Act, 1847.

On the 5th of February, 1872, the clerk of the defendants wrote to the plaintiff, stating that "in consequence of the condition of their funds, and a notice of motion from a conservator," they would have to consider the question of reducing the plaintiff's pension to such an amount as the condition of the conservancy would allow, and inviting him to attend a meeting to be held on the 16th of February. The plaintiff was unable to attend, but wrote, denying the power of the defendants to make any reduction. At the meeting of the 16th of February, however, the

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following resolution was passed: "That the resolution of the 16th of March, 1865, granting a pension of 300*l.* per annum to Mr. John Marchant (the plaintiff), late clerk to the trustees of the River Lee, be altered, by the reduction of the amount to 150*l.* per annum as from Christmas last, the same to be paid during the pleasure of the board." The defendants accordingly paid 37*l.* 10*s.* only for the quarter ending the 25th of March, 1872, and the plaintiff thereupon commenced this action for the balance. The accounts annexed to the case shewed, as the defendants contended, a state of funds justifying the reduction of the plaintiff's pension. The question for the court, who were to draw inferences of fact, was whether the plaintiff was entitled to recover the sum of 37*l.* 10*s.*, being the balance making up the quarter of his original pension.

Benjamin, Q.C. (*J. M. Hayman* with him), for the plaintiff, contended that the defendants, who were in the same position as the trustees, could not vary the amount of the pension originally granted.

The Court called upon

J. Brown, Q.C. (*Barnard* with him), for the defendants. If the grant of this annuity had been by deed, it would have been irrevocable: *Clarke* v. *Imperial Gas Light Co.* (1) But not being by deed, it is revocable at the pleasure of the grantors. In *Gibson* v. *East India Co.* (2) it was held that a retiring pension granted to a military officer of the East India Company was a mere gratuity; that the grantee could not sue for the arrears of it, and that, consequently, it did not pass to his assignees in bankruptcy. Again, in *Innes* v. *East India Co.* (3), it was held that a superannuation allowance awarded by resolution of the court of directors, pursuant to 53 Geo. 3, c. 155, s. 93, to a retired civil servant of the company, was not a "debt" capable of being attached, but was a "mere gratuity." The latter case is directly in point. Moreover, the words of s. 76 of the Lee Navigation Improvement Act, 1850, apart from authority, are decisive. The grant is wholly in the discretion of the trustees, who "from time to time"

(1) 4 B. & Ad. 315. (2) 5 Bing. N. C. 262.
(3) 17 C. B. 351; 25 L. J. (C.P.) 154.

may pay and allow it out of moneys which may come to their hands. The language used clearly indicates that the trustees are to have the absolute control of the grant, and a power to vary, or even stop it altogether, should the circumstances, either of the company whose revenues depend upon the tolls received, or of the annuitant, appear to demand or warrant such a course. There was no contract between the parties. The mere resolution of the trustees does not amount to a contract: *Vaughton* v. *Brine.* (1)

Benjamin, Q.C., in reply. The granting or withholding of the annuity may be matter of discretion. But once granted, the retiring servant is entitled to it for his life; at all events, unless he has done something to warrant its being withheld or varied. The 76th section of the Lee Navigation Improvement Act speaks of an "annuity," which must be taken to mean an annual payment for the life of the retiring servant.

KELLY, C.B. I feel considerable doubt upon this case; but upon the whole I am of opinion that the plaintiff is entitled to our judgment. The 76th section of the Act of Parliament (13 & 14 Vict. c. ix.) contemplates the settlement of an "annuity" upon a retiring officer. That must mean a fixed sum payable yearly and every year throughout some term or other. But throughout what term? Some term must be contemplated, otherwise the word "annuity" is meaningless. And I think that the term must be taken to be for the life of the annuitant, provided that his circumstances remain the same, and he has done nothing to warrant any alteration.

MARTIN, B. I am of the same opinion. The statute, in my judgment, authorizes a fixed payment to be paid to a retiring officer who is incapable of continuing his services; but that payment, when once fixed, must continue. It cannot have been intended that a retiring servant was to give up his annual income for an annuity which might be altered at the mere pleasure of his employers. The pension, when once granted, is a permanent thing, not capable of alteration at the discretion of the board.

Two cases have been cited to us by Mr. Brown, in both of which the East India Company were defendants. But as to these, it

(1) 1 M. & G. 359.

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must be remembered that the East India Company had a double aspect. They were a trading corporation, but for many purposes were a sovereign power. It may be that in both those cases, one of which related to a civil, and the other to a military, servant, the company, as a sovereign power, had authority to vary the pensions granted. But I do not feel compelled to recognise them as decisions governing the present case. I think that, upon the true construction of s. 76 of 13 & 14 Vict. c. ix., the plaintiff's pension, when once fixed, could not be altered. The annuity granted was intended to be permanent in amount and was expressed to be for the life of the retired servant.

Judgment for the plaintiff.

Attorneys for plaintiff: *Mackeson, Taylor, & Arnould.*
Attorney for defendants: *Pead.*

June 6.

BETTS *v.* THE GREAT EASTERN RAILWAY COMPANY.

Superfluous Land—Land not immediately available for the Purposes of the Railway, but bonâ fide retained for such Purposes—Lands Clauses Act, 1845 (8 *Vict. c.* 18), *s.* 127.

2 QBD 239
348
5 App Cas 7
26 Ch D 578

Land which is taken by a railway company for the purposes of their Act, and which is bonâ fide retained by them with a reasonable expectation of using it for such purposes, does not at the expiration of ten years from the time fixed for the completion of the works vest in the adjoining owner as superfluous land under the Lands Clauses Act, 1845, s. 127, merely because, from insufficiency of traffic, or from want of funds, the company cannot immediately apply it to such purposes, although it is in the meanwhile let out to yearly tenants, and applied to purposes for which it is in its then condition suitable.

affirmed 36 L. T. 182

This was an action of ejectment brought by the adjoining owner to recover certain small pieces of land contiguous to the Great Eastern Railway, and which, together with the site of the line and of the Diss Railway Station, had been compulsorily taken under the following Acts.

The Ipswich and Bury St. Edmunds Railway Company were incorporated by an Act of 8 & 9 Vict. c. xcvii., for the purpose of making a railway from Ipswich to Bury St. Edmunds; and by an Act of the following year, 9 & 10 Vict. c. cclxxx., reciting the pre-

vious Act, the same company were empowered to make a branch from Haughley to Norwich. Both Acts incorporated the Lands Clauses Act, 1845, and 9 & 10 Vict. c. cclxxx., under which the land in question was taken, enacted (s. 8) that "the railway shall be completed within five years from the passing of this Act [27th of July, 1846], and on the expiration of such period the powers by this or the recited Act granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the railway as shall then be completed."

The branch from Haughley to Norwich was completed within the period of five years, and now, by various Acts of amalgamation, formed part of the defendants' line.

On the trial of the cause before Channell, B., at the Norfolk Summer Assizes, 1870, the facts appeared to be as follows:—

The land in question (with the exception of one small triangular piece) was an irregular strip from 900 to 1000 yards in length, running along the east side of the railway embankment and cutting, and varied in width from a few feet to about seventy-five yards, all which land was fenced off from the railway works as well as from the adjoining lands, and was divided by fences into several plots, containing respectively 0*a.* 3*r.* 13*p.*, 0*a.* 2*r.* 1*p.*, 0*a.* 3*r.* 21*p.*, 0*a.* 0*r.* 14*p.*, and 1*a.* 3*r.* 14*p.*

The plot of 0*a.* 3*r.* 13*p.* had been originally intended to be used in the construction of a road from the south to the station, and to sheds and granaries which it was then intended to erect; but from want of funds the road had never been made, and the land had been used as pasture land, and had been in the possession of various persons under arrangements with the company, the nature of which did not very clearly appear.

The plot of 0*a.* 2*r.* 1*p.* had been used by the company as a "lair" for cattle coming by the line, and for depasturing horses of the company used at the station.

On the plot of 0*a.* 3*r.* 21*p.* some stables, granaries, and coal-sheds, and a public house had been erected and used under the following circumstances:—The stables had been erected by the company, and were used by them for their horses employed at the station; but a portion of them had also been let to other persons. The coal-sheds and granaries had been put up by certain persons on

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lands which they respectively occupied as tenants at sufferance, but with an understanding that they should buy the land, subject, however, to a right in the company to resume possession on paying compensation; but this arrangement had never been formally carried out. The granaries and coal-sheds were used by these persons for temporarily storing goods brought for them, in the way of their trade, by the defendants' line. The public house had been built by one of these same persons on the land which he occupied under the above-mentioned arrangement with the company, but contrary to his agreement with them; it was frequented by drovers, carters, and others bringing cattle and goods to the station, and accompanying the trains, there being no refreshment-room at the station. Under the above-mentioned arrangement with these tenants the company had laid down sidings, and an approach road to the buildings erected on this plot.

With respect to the plots of 0*a*. 0*r*. 14*p*. and 1*a*. 3*r*. 14*p*., (the latter being a large triangular piece, with its apex distant about seventy-five yards from the railway) they were taken for the purpose of constructing sidings and a road to the station from the north, but through want of funds these works also had not been made. The land was occupied as arable land by one of the same persons who occupied the coal-sheds and granaries; he paid an annual rent for it, but was under terms to give it up when required by the company. It had been previously occupied as arable land by other persons as yearly tenants.

General evidence was given that the traffic at Diss Railway Station had lately much increased, and that this land was required by the company for conveniently carrying on their business, and for enlarging their works, and improving the access to the station.

In addition to this continuous strip of land there was (as above stated) another small triangular piece of 0*a*. 1*r*. 3*p*., lying on the same side of the railway at about 150 yards distance from the northern end of the land already described. This consisted, in part, of the site of an old road, which (instead of following the plan sanctioned by their Act) the company had diverted without legal authority, and, in part, of land which they had taken for the purpose of effecting the diversion; it had lain waste ever since, and (so

far as it belonged to the company) was retained by them to provide against the contingency of their having to restore the old road.

The jury found, in answer to questions left to them by the learned judge, "that the whole of the lands in question were taken solely for the purposes of the Act; that they were and are duly fenced off from the adjoining lands, and that they have ever since been and are still retained, bonâ fide, for the purposes of the Act," and a verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for him as to the whole or any part of the land.

A rule was obtained accordingly to enter a verdict for the plaintiff, or for a new trial, on the grounds, first, that the lands, not having been dealt with nor used by the company within the five years limited by their Act, became superfluous lands, and that the finding of the jury that they had been, nevertheless, bonâ fide retained by the company was immaterial; secondly, that the company could not, after having parted with the possession of lands acquired for the purposes of their undertaking, resume it, or retain such lands in the occupation of tenants, beyond the period of ten years from the completion of their works; thirdly, that the learned judge ought to have directed the jury that the said lands were severally superfluous lands within the meaning of the Lands Clauses Act, 1845, upon the evidence; fourthly, that the verdict was against the weight of evidence. (1)

June 5, 6. *O'Malley, Q.C.*, and *Metcalfe, Q.C.*, shewed cause. The question of whether the land is superfluous land is for the jury:

(1) The Lands Clauses Act, 1845 (8 Vict. c. 18), enacts as follows:—"And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted.

Sect. 127, within the prescribed period [i. e. "prescribed for that purpose in the special Act," see s. 2], or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

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Doe d. Armistead v. *North Staffordshire Ry. Co.* (1); and the findings of the jury in this case amount to a verdict that this land was not superfluous. The findings are supported by the evidence, for the Lands Clauses Act does not render it imperative on the company to use the land at once in railway works, provided there is a reasonable probability that in the ordinary course of things it will be required for that purpose. As to all the land, except the piece of waste ground, it is shewn that the increase of traffic at Diss station requires an extension of the works, for which that land was necessary; this had only been prevented hitherto by the embarrassed state of the company's finances, but the company had provided for it by retaining the control of the land; and as to the piece of waste land, it would be also required for restoring the old road, if, as was possible, the company were compelled to restore it, and for carrying out the works according to the original design. [They were stopped.]

Bulwer, *Q.C.*, and *Merewether*, in support of the rule. First, the company's power to make additional works expired at the end of the five years limited by the Act of 9 & 10 Vict. c. cclxxx., by which the land necessarily became superfluous land, and, on the company failing to sell the land within the ten years following that period, became the property of the adjoining owner.

[POLLOCK, B., referred to the Railway Clauses Act, 1845 (8 Vict. c. 20), s. 16, and the definition of "the railway," in s. 3.]

Secondly, even taking the findings of the jury to be correct, the land is shewn to be superfluous land. The jury have not found that the land was either used or required for the purposes of the Act, but only that it was "retained." It is contrary to the policy of the Lands Clauses Act that a company should retain land for an indefinite period of time, on the expectation that it may be required for the purposes of the railway, and that they may be in possession of funds to make it available, although they have not at present the means of doing so, in the mean time constituting themselves landlords. This is especially plain as to the large triangular piece of 1*a.* 3*r.* 14*p.*, which in all respects, both as to its state and as to its mode of use, resembles the land which was determined, in *May* v. *Great Western Ry. Co.* (2) to be superfluous

(1) 16 Q. B. 526; 20 L. J. (Q.B.) 249. (2) Law Rep. 8 Q. B. 26.

land. As to this piece, therefore, at least the plaintiff is entitled to the verdict. Thirdly, the verdict is against the evidence.

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KELLY, C.B. The real question in this case is whether these strips or small pieces of land in respect of which this action of ejectment is brought, at the expiration of the five years from the passing of the Act of Parliament, or at any time within ten years next succeeding, became superfluous lands, that is, lands which were not required for the purposes of the railway within the meaning of s. 127 of the Lands Clauses Act, 1845.

That was strictly and properly speaking a question of fact for the jury. But it seems that one or two questions of fact were left to the jury in order that their findings might assist the Court in coming to a conclusion upon the case, and that it was assented to by the parties that with the assistance of these findings the Court should determine whether, upon the facts proved, the lands must be deemed in point of law to have become superfluous lands.

First, then, does the mere non-user of any land acquired by the company for the purpose of their railway, during the ten years next following the time fixed for the completion of the railway, make the land superfluous, as land not required for the purposes of the Act of Parliament, and so entitle the owners of the adjoining lands to take it as their property? Is it in fact forfeited by the railway company, who have purchased and paid for it, to the owner of the adjoining land by reason, not of express evidence to the satisfaction of the jury that it is not required for the purposes of the Act of Parliament, but upon the mere fact that it has not been dealt with nor used by the company within the period of ten years?

I am clearly of opinion that the mere non-user of the land does not make it as matter of law superfluous land within the meaning of the Act. There may be many cases (and I think, looking to the whole of the evidence before us, that this is one) in which a railway company, having acquired lands contiguous to and adjoining the railway, or in the immediate neighbourhood of the railway, for the purposes of the Act of Parliament, and being, either from want of funds or from some other cause, unable conveniently to apply them to those purposes, may well retain them

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in their possession with the intention of ultimately so applying them. And I should be very sorry to attempt to limit the period during which it might really be contemplated and *bonâ fide* believed by a railway company that, by the increase of traffic on their railway, they would be enabled to turn those lands to account for the erection of buildings, for constructing a road, or for any other purpose immediately connected with the railway, and strictly a purpose of the railway, within the language of the Act.

Now, let us look to the position and the dimensions of these pieces of land. They are small strips immediately contiguous to the railway. I can hardly doubt that these small pieces of land, not only contiguous to the railway, but so small that the slightest extension of the works of the railway at that point would render it necessary to take them in, might well have been reserved by the company with the express intention of appropriating them to works or buildings essential to the ordinary purposes of a railway, and without any idea of either abandoning them or turning them to account in a way they were not entitled to do.

Although the company would not have been justified in letting the lands to a tenant to enable him to erect buildings, with a view that he should continue as their tenant, yet when we look to the nature of most of these buildings and to the fact that the company in permitting their tenant to occupy the land at all, reserved the right to themselves of taking possession of the land, and compensating the tenant when they thought fit, it is quite clear that it was to some of the legitimate purposes of the railway company that they contemplated to apply, not only the land, but the buildings which they thus permitted to be erected. Moreover, the lands are so immediately contiguous to the railway itself and to the station, that upon any considerable increase of traffic, the lands would become almost indispensable as a mode of access to the railway. Considering, then, that whether for the purpose of using the buildings as coal-sheds, warehouses, or granaries, or for the purpose of using the land as a mode of access to this station and this portion of the railway, the land is eminently adapted to the purposes of the railway, it appears to me that the jury were perfectly justified in their finding, and that they would have been justified in finding, if the question had been left to them, that

these pieces of land were, at the time when they were taken, and have been ever since, required for the purposes of the railway.

In *May* v. *Great Western Ry. Co.* (1) there was a very large piece of land extending a considerable distance from the railway, which had become for a great number of years entirely disconnected from the railway, which had never been applied to any of the purposes of the railway, and as to which there was not the slightest evidence of an intention on the part of the company ever to apply it to the purposes of the railway; it had been, in fact, applied to other purposes—that is, portions had been let out as garden ground, other portions as arable land; and it had been so let out for a great number of years, just as if the company had been ordinary landlords. That case is, therefore, no authority that can assist the plaintiff upon this occasion.

It only remains to be considered whether the 8th section of the defendants' special Act prevented the railway company from exercising any of the powers of the Act, or from erecting any building or applying land to any purpose connected with the railway, after the expiration of the five years.

That section follows immediately upon the 6th section, which empowers the company to purchase a quantity of land, not exceeding fifty acres, for extraordinary purposes, and the 7th section, which provides that the powers of the company for the compulsory purchase of lands shall not be exercised after the expiration of three years. It is quite clear, independently of the exception at the end of the section, that the 8th section applies only to powers of the company to be exercised as against strangers to the company, that is, in the doing of any act that may interfere with the possession or enjoyment of the lands of strangers; and it can have no application to the mere erection of a building, or the making of a road, in addition to the works originally constructed. The exception, however, puts an end to any doubt—"except as to so much of the railway as shall then be completed." Well, then, this railway was completed at the end of five years, and anything necessary to the more complete or profitable enjoyment of that railway, an additional station, additional buildings, additional roads, a new access, anything of that description which would add to the value and

(1) Law Rep. 8 Q. B. 26.

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usefulness, and assist in the full enjoyment and turning to a profitable account of the railway, would come within this exception. This is one of the cases, therefore, which clearly comes within the exception.

Upon all these grounds, I am of opinion that, with or without the findings of the jury, and looking especially to the ground upon which this rule has been granted and to which the parties are now confined, if we consider the matter as a question of law, it is not shewn by the plaintiff that these lands are superfluous lands, in other words, that they are not, or were not within the period of fifteen years, required for the purposes of the railway company.

Therefore I am of opinion that the verdict ought not to be disturbed.

MARTIN, B. I am of the same opinion. Although the question was not left to the jury in the form in which if I had tried this cause, I should have left it, I think it was left substantially in a correct form, and their finding is conclusive.

The section upon which the case depends is s. 127 of the Lands Clauses Consolidation Act, 1845. I quite agree that this being an enactment of the Legislature it ought to be carried out fairly and properly; but it still is an enactment of forfeiture. It takes from owners of the land that which they have bought, and it gives that land to a man who has paid nothing for it. Therefore it seems to me it ought to receive a strict, but nevertheless a fair, construction.

The question is, what are superfluous lands? To ascertain that you must look at the introductory words of the section, which are these: "With respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, which shall not be required for the purposes thereof, be it enacted, &c." Therefore superfluous lands are lands which have been acquired by promoters, and which shall not be required for the purposes of the Act. Whether land is so required is not a question of law, but is a question of fact for the jury.

Now what is this case? The period for the termination of the powers of the Act was the 27th of July, 1851. I do not agree with the construction put upon the 8th section of 9 & 10 Vict. c. cclxxx.

by Mr. Bulwer. I think what is determined at the expiry of those five years is certain special powers given by the Act, such as the power to cross certain roads mentioned in the next section. There is nothing to prevent the company going on and continuing the railway. Then were these lands required for the purposes of the Act? I have no doubt they were. This company was an embarrassed company, as is generally known. Being authorized to take those lands, they took them; but, being unable themselves to apply them, they did the best they could; they got persons who would go to the expense of making granaries, coal sheds, and other things conducive, and some of them essential, to the beneficial carrying on of the railway. I think the jury were amply justified on the evidence in finding that this land was, at the time of bringing this ejectment, required for the purposes of the Act. My opinion, therefore, is that this verdict is right and ought to be supported.

POLLOCK, B. I agree that this rule should be discharged. What the plaintiff had to establish at the trial was, that the railway company had failed to use or to sell this land within the time appointed by the Legislature.

The term "superfluous land" is construed in the heading of the section by the words "lands which shall not be required for the purposes of the Act," that is for the purposes of the special Act under which the railway is constructed. Now I am desirous of giving the plaintiff the fullest benefit of the point reserved by Baron Channell, and the way in which it seems to me the point arose was this: up to a certain point the learned counsel and the judge were all at one in considering what was the proper construction to be put upon the Act of Parliament; and the question was whether, assuming all the acts that had been done by the company and all the evidence that was given by the company to be correct and bonâ fide, these pieces of land were in point of law superfluous lands. Then, a considerable body of evidence having been given upon that subject, and the point being ripe, so far as it was a point of law, for the decision of this Court, so the matter rested; but it was thought wise and prudent that the jury should express their opinion as to whether the whole of the lands in question were taken solely for the purposes of the Act, whether they were and are duly

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fenced off from the adjoining lands, and (now come the important words) "whether they have ever since been and are still retained bonâ fide for the purposes of the Act"; that is to say, assuming the acts done, if done bonâ fide, to be acts which would shew that the lands were not superfluous lands and were required for the purposes of the Act, then were those acts done bonâ fide? The jury find that they were.

Now with regard to whether these strips were or were not superfluous lands, any one who knows the history of the construction of railways, certainly since 1845, which was the year this Act of Parliament was passed, is perfectly aware that the user or non-user immediately of the land which the company have bought under the powers of their Act of Parliament must depend upon a great many circumstances; sometimes upon circumstances, partly physical, affecting their own line, sometimes upon the condition of other lines with which junctions have been or are to be effected; and sometimes also upon the financial condition of the company, which does not enable them to develop the traffic and work their line within as early a time as they might desire to do. All these are facts which ought to be taken into consideration in this case; and I agree with my Lord that while, on the one hand, we should watch closely to see that the railway companies never become jobbers of land, or hold land as landlords for a profit, on the other hand I should decline to lay down any limit, so long as I found that lands have been taken for the purposes of the Act, and that those who have the management of the company honestly believe that at some future time they may fairly and properly require those lands for carrying out the undertaking.

I agree with Mr. Bulwer that in that sense the question is an important one. I think it should be thoroughly understood what is the construction of this Act of Parliament. In that sense I understand, as matter of law, it was left for us, and I can have no doubt myself that these lands were not superfluous lands within the meaning of the Act.

Rule discharged.

Attorneys for plaintiff: *Hayes, Twisden, & Parker, for Heffill & Salmon, Diss.*

Attorney for defendants: *Shaw.*

TYERS AND OTHERS *v.* THE ROSEDALE & FERRYHILL IRON COMPANY, LIMITED.

1873
May 6.*

Contract of Sale—Monthly Deliveries—Forbearance of Vendor at Request of Vendee—Measure of Damages—Statute of Frauds (29 *Car.* 2, *c.* 3) *s.* 17.

The defendants in October 1870 contracted to sell to the plaintiffs 2000 tons of iron, "delivery in monthly quantities [of 166⅔ tons] over 1871, or sooner if required," payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871 up to and including November. In December the plaintiffs required delivery of the residue of the whole 2000 tons, and, upon the defendants' refusal, brought an action for non-delivery :—

Held (by Kelly, C.B., and Pigott, B., Martin, B., dissenting), that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2000 tons in December, and were therefore not entitled to recover :

By Martin, B., first, that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2000 tons under their contract ; and secondly, that the proper measure of damages was the difference between the contract and market prices in December, 1871, when the defendants refused to deliver the iron.

Ogle v. *Lord Vane* (Law Rep. 2 Q. B. 275 ; Law Rep. 3 Q. B. 272), discussed.

Declaration in Exch 762 10 Jur 195.

DECLARATION against sellers for not delivering 1000 tons of Ferryhill pig iron, on the terms of the following sold note :—"Sold Messrs. Tyers, Middleton, & Co., 1000 tons Ferryhill pig iron, in equal quantities, of grey forge, mottled, and white ; price 50*s.* per ton, delivered at their siding—any rate in excess of the usual 6*s.* per ton railway dues to be charged extra ; delivery in monthly quantities over 1871, or sooner if required ; payment by their four months' acceptance from the 10th of the month following delivery."

Second count, on a second contract, similar in its terms, for another 1000 tons of pig iron.

Third count, that it was agreed between the plaintiffs and the defendants, as in the first and second counts mentioned, and after

* Decided in Easter Term.

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the making of those agreements, and before breach, it was further agreed between the plaintiffs and the defendants that the time for the delivery of the iron should be altered, and the defendants should deliver the iron to the plaintiffs within a reasonable time in that behalf, and all conditions were performed, &c., yet the defendants did not deliver the iron to the plaintiffs within a reasonable time in that behalf.

Pleas: 1. To the breaches in first and second counts, except so far as they relate to the non-delivery of iron prior to November, 1871, payment of 170*l.* into Court.

2. To the third count, a denial of the contract. 3. To the same, that a reasonable time for the delivery of the iron had not elapsed. 4. To the same, a denial of the breach.

5. To so much of the breaches in the first and second counts as relates to the non-delivery of iron during the months prior to November, 1871, that the defendants were always ready and willing to deliver, but the plaintiffs were not ready and willing to accept. 6. To same, exoneration and discharge. Issue.

The cause was tried at the Leeds Summer Assizes, 1872, before Blackburn, J., without a jury, when the following facts were proved:—

The plaintiffs are iron manufacturers, carrying on business at Leeds, and the defendants are a company carrying on business as makers of pig iron at Ferryhill and Newcastle. On the 26th of October, 1870, the following sold note was forwarded to the plaintiffs, signed by the defendants' agent:—

"Sheffield, October 26th, 1870.

"Messrs. Middleton & Co. 1000 tons Ferryhill pig iron in equal quantities of grey forge, mottled, and white, price 50*s.* per ton, delivered at their siding. Any rate in excess of the usual 6*s.* per ton railway dues to be charged extra. Delivery in monthly quantities over 1871, or sooner if required. Payment by their four months' acceptance from the 10th of the month following delivery. "Robert Smith, Agent."

A bought note in similar terms was signed by the plaintiffs. On the 1st of November a contract in identical terms for another 1000 tons of pig iron was entered into between the parties.

The plaintiffs did not require any of the iron to be delivered, nor was any delivered, by the defendants during 1870.

On the 12th of January, 1871, the defendants delivered to the plaintiffs 16 tons of grey forge and 24 tons of mottled iron; on the 15th of January 14 tons of grey forge and 35½ tons of mottled iron; and on the 17th of January 11½ tons of mottled iron.

On the 16th of February the plaintiffs sent to the defendants the following letter:—

"You will oblige by sending no more iron this month."

The defendants accordingly delivered no more iron during the month of January. On the 20th of February the defendants delivered to the plaintiffs 25 tons of grey forge and 25 tons of mottled iron. On the same day the plaintiffs wrote the defendants,—

"You will greatly oblige us by not sending in any more iron until we write. We are now so full of metal we do not know where to put it. In another month we hope to be better off for room, but we really cannot do more at present." The defendants replied:—

"We have yours of yesterday, and have instructed our people at Ferryhill to stop delivery until further orders."

On the 2nd of March the defendants delivered to the plaintiffs 11½ tons of grey forge and 14½ tons of mottled iron; and on the same day the plaintiffs sent to the defendants the following letter:—

"Your advice note of a further delivery of iron is to hand. We must remind you again that we are not yet in a position to take more iron in, and beg you will not send more until you hear from us. We are just completing four more puddling furnaces with boilers attached, and we want to have them in work as soon as possible; but we are at a stand now, as the metal already sent in takes up part of the room where those furnaces must stand. We are arranging to lay a new metal yard down, and to run our lines into it. For this purpose the present siding has to be altered, so that we are completely at a stand until we can get you gentlemen to stay delivery for a fortnight or so. We will write you on the very earliest date when we can take iron in with anything like convenience."

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The defendants replied:—

"March 3rd, 1871. We have yours of yesterday, and have stopped deliveries of pigs for a fortnight."

On the 14th of March the defendants delivered to the plaintiffs 15 tons of grey forge and 15 tons of mottled iron; on the 17th of March, 20 tons of grey forge and 20 tons of mottled iron, and on the 18th, 20 tons of grey forge iron.

On the same day the plaintiffs sent to the defendants the following letter:—

"March 18th, 1871. We are again compelled to request you not to send us any more iron in until further orders, as we are completely at a loss where to put it. You have now sent in no less than 60 tons since we first requested you to withhold deliveries. Out of all our friends whom we have bought from, you are the only ones who have not attended to our request. You are putting us to serious inconvenience and expense, as we have not room to stock such a quantity. Please oblige us in this matter."

The defendants replied, stating that they had stopped delivery of pig iron until further orders.

On the 21st of March the defendants delivered to the plaintiffs 15 tons of grey forge iron: and

On the 1st of April the plaintiffs sent to the defendants the following letter:—

"1st April, 1871. You really must stay any further delivery of iron until you hear from us. You and other friends have sent in such quantities that we are blocked out, and have not room for a single pig. As it is, our alterations are seriously impeded. We should not ask you to stay delivery if we could consume all as it came in, but this we cannot do until we have more furnaces, which are in course of erection. Your attention will oblige."

The defendants replied:—

"We have stopped deliveries of your pig iron."

On the 5th of April the defendants delivered to the plaintiffs 25 tons of grey forge iron, and on the 25th of April 25 tons of grey forge iron.

On the same day the plaintiffs sent to the defendants the following letter:—

"We are much surprised to receive, this morning, advice for 25 tons pig iron, after we most particularly requested you to send no more until we wrote. We must beg of you to attend to our instructions more particularly, and rest assured you will receive instructions when we are in a position to take your iron. You are the only friends who do not do as we desire."

On the 26th of April the defendants replied:—

"We have yours of yesterday, and have advised our people at Ferryhill not to send you any more iron without our instructions from this office."

On the 26th of May the defendants sent to the plaintiffs 24 tons of grey forge iron. On the 27th of May the plaintiffs wrote:—"You wrote us, promising not to forward any more iron until you heard from us, and now you are forcing more upon us at the very last day of the month as it were. The works will be closed from to-day until Wednesday, and you must send no more until we write;" and on the 9th of June:—"Your favour to hand. We now enclose you acceptance, covering 60*l.*, which please place to our credit, forwarding stamped receipt per return. We have advice of 20 tons of iron from you; this we do not want. You must on no account send more than 20 tons more—in all 40 tons—this month. Please advise your people at the mines."

On the same day the defendants delivered to the plaintiffs 20 tons of mottled iron, and on the 10th the plaintiffs wrote again:—

"You must oblige us by not sending any more iron this month. We really cannot do with it, or we would gladly take more in. Please let this have your best attention, and oblige."

On the 13th of June the defendants delivered to the plaintiffs 20 tons of grey forge iron.

On the 26th of June the plaintiffs wrote:—

"You are most particularly requested not to send more iron in this month. We are now put to great inconvenience by your not doing as we wish. Where to put this lot, advised this morning, we do not know. You must not do this way with us. We should not

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ask you to stay delivery without having good reason for so doing. You must not send more in until we write."

On the 27th of June the defendants delivered to the plaintiffs 21 tons of grey forge and 21 tons of mottled iron, and on the 28th of June the defendants replied to the letter of the 26th:—

"We have stopped deliveries of pigs until further orders."

On the 30th of June the plaintiffs requested the defendants to send at once 20 or 30 tons of white pig iron:—"Let it be good. If up to the mark we shall want more. We cannot do with anything else but white."

The defendants replied that they had directed the 40 tons to be sent at once.

On the 1st of July the plaintiffs wrote:—"No iron to be sent in unless written for."

On the 7th of July 30 tons of white iron were delivered; on the 27th of July 30 tons, and on the 4th of August 20 tons more.

On the 5th of August the plaintiffs wrote:—

"You will oblige by not sending any more white iron; we have more than we can do with. It would suit us much better if you would not press deliveries upon us, but wait till we write."

On the 7th of August the defendants wrote:—

"Yours to hand. Kindly take in that sent; we will not send any more white till we hear from you."

On the 4th of September the defendants delivered 24 tons, and on the 14th, 29 tons of white iron. On the same day the plaintiffs wrote:—

"Don't send any more white at present; the last lot sent in is not fit to use. We don't know what to do with it."

On the 15th, the defendants wrote:—"We have yours of yesterday, and have stopped deliveries of pigs until further orders."

On the 16th, defendants delivered 12 tons of white iron.

On the 29th of September the plaintiffs wrote:—"Please send us on Monday next 50 grey iron from our contract; also send another 50 tons the week following. Your attention will oblige."

To which the defendants replied:—"Your order of yesterday shall have our best attention."

On the 3rd of October the defendants delivered 37½ tons of grey forge; on the 6th, 12½ tons of grey forge; on the 11th, 24 tons of grey forge; and on the 18th, 26 tons of grey forge iron.

On the 25th of October the plaintiffs wrote:—"We must beg of you to let us have a delivery at once of grey forge, as per contract, say 50 tons. We are nearly cleared out, and must have iron to keep us going."

On the 27th of November the defendants wrote:—"We have yours of the 25th, and have instructed our Ferryhill people to forward you a supply at once."

On the 30th of November the plaintiffs wrote:—"We are compelled to press you again for a delivery of grey iron. We are now without, and must beg of you to let us have some at once."

On the 1st of December the defendants wrote:—Yours to hand. Part we sent yesterday, and have written our agent to see you relative to your contract, which expires at the end of this month."

On the same day the defendants delivered 27 tons of grey forge iron.

On the 5th of December the plaintiffs wrote:—"Yours of 1st December to hand, and contents noted. We are surprised that we receive no iron from you, though we have asked for deliveries several times. We are fully aware that the contract expires at the end of the year. We shall hold you to the completion of same, and all must be delivered by the end of this year."

On the 6th of December the defendants wrote:—"Yours to hand, and note contents, and glad you agree with us as to the contract expiring. The contract quantity will of course be delivered this month, 167 tons, and as we are sadly bothered as to the supply of trucks, and in consequence had to stack iron in November, we are prepared to deliver 140 tons next month, or extend part to February. This we understand to be in excess of what you ask. Are you buying for next year? as our order-book is now virtually filled up."

On the 7th of December the plaintiffs telegraphed:—

"7th Dec., 1871. You have misconstrued our lettter. We shall decidedly hold you to deliver the remainder of 2000 tons. We want twelve hundred and eighty tons. Send all at once."

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On the same day the defendants replied:

"Dec., 1871. Your telegram to hand. Don't understand it. The contract is clear and needs no comment on our part. The contract quantity will be sent this month. The difficulty is to get trucks."

Further correspondence ensued, the plaintiffs insisting upon the delivery of the balance of the 2000 tons, and the defendants denying that they were liable to deliver any more than what was due on the monthly balance, and eventually this action was brought. The money paid into Court was sufficient to cover the deficiency due on the monthly balance. The learned judge at the trial ruled, that the effect of the different postponements, at the request of the plaintiffs and by the consent of the defendants, was not to put an end to the contract, but only to postpone the time for the delivery, and consequently there was a breach of contract. He reserved leave to the defendants to move to enter a verdict on the construction of the documents and correspondence. As to the damages, he further ruled that the breach was on the day in December when the defendants definitively refused delivery, and that the damages were to be estimated at that date, the defendants to have leave to move that the damages be estimated at any other period or upon any other principle the court might lay down, and to reduce the damages, or enter the verdict accordingly. In pursuance of the above ruling a verdict was entered for the plaintiffs for 649*l.*

In Michaelmas Term, 1872, a rule was obtained accordingly to enter a verdict for the defendants or to reduce the damages on the ground that the quantities undelivered were so undelivered at the request of the plaintiffs, and that the plaintiffs were not ready and willing to take them when they ought to have been, and that plaintiffs were not entitled to sue in respect of them; that the original contract was abandoned or varied; that no new contract to the effect alleged by the plaintiffs resulted from the evidence; that the damages ought to be calculated at the monthly prices of each month's deficiencies, and that the money paid into court was enough; and that the postponement (if any) was not to the month of December, and that the breaches should have been taken each month to the 1st of December,

Jan. 29. *Seymour, Q.C.*, and *Cave* shewed cause. The purpose of the correspondence was simply to postpone delivery from time to time, and not to exonerate the defendants from delivery altogether of the whole two thousand tons. If the application for postponement come from the vendor, it is decided by *Ogle* v. *Lord Vane* (1) that he still remains liable upon his contract. The principle of that case governs the present, where the application for postponement came from the vendee. The correspondence in effect amounts to a new contract to deliver increased quantities later in 1871 than was originally contemplated: or such a contract can be implied from the conduct of the parties. It relates to a contract, not for the sale but only for the delivery of goods, so that the Statute of Frauds, s. 17, does not apply, and in December, 1871, the plaintiffs were entitled to demand the whole balance of iron due on the contract. As to the damages they were assessed upon the right principle. The plaintiffs are entitled to the difference between the contract and market price at the date of the defendants' refusal to deliver.

Field, Q.C., and *Waddy*, in support of the rule: *Ogle* v. *Lord Vane* (1) has no application, for here the vendee and not the vendor was the person who desired to postpone the deliveries. That being so, he cannot afterward insist upon the whole undelivered balance being delivered in one month. All he can claim is delivery of the regular monthly quantity. No new contract can be gathered from the correspondence, and none can be implied from the conduct of the parties, inasmuch as a new contract, varying the terms of the original one, must be in writing where the original must be in writing under the Statute of Frauds.

Again, assuming the plaintiffs are liable, the damages should have been calculated at the monthly prices of the deficiencies of each month. The sum of these would be the proper measure: *Brown* v. *Muller* (2).

Cur. adv. vult.

May 6. The following judgments were delivered:—

KELLY, C.B. The two contracts in question, taken together, are for the delivery by the defendants, and acceptance by the plain-

(1) Law Rep. 2 Q. B. 275; S. C. in Ex. Ch. Law Rep. 3 Q. B. 272.
(2) Law Rep. 7 Ex. 319.

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tiffs of 2000 tons of iron in monthly deliveries, during the year 1871, of equal quantities in each of the 12 months, or 166⅔ tons per month; payment by acceptances at four months from the 10th of the month following delivery. In January, 101 tons only were delivered, and no demand was made for the delivery of the 65⅔ tons at any time in January, or at any other time, until December. On the 16th of February, and at several periods between that time and the month of December, 1871, the plaintiffs requested the defendants by letter to deliver no more during the then current month, and sometimes to deliver no more until further orders, and these requests were acquiesced in by the defendants; and partial deliveries only were consequently made during the several months following, until and including the month of November. In December, the price of iron having considerably risen, the plaintiffs required the delivery of the remainder of 2000 tons undelivered, or 1280 tons. The defendants delivered 187 tons, leaving 1093 tons undelivered, for the non-delivery of which the plaintiffs have brought this action, and claim the difference between the market price in December and the contract price of this quantity as damages. The plaintiffs insist that, although the non-delivery of the several quantities of iron undelivered in each of the first eleven months of the year was at their request and for their accommodation, and although there was no express contract on the part of the defendants to deliver the quantities undelivered at the end of each month, in the following month, or at any subsequent period, the contract remained in force not only as regarded the remainder of the 166⅔ tons within the current month and the 166⅔ tons, if called for, in each of the months following throughout the year, but as regarded the aggregate of all the quantities undelivered in compliance with their own request throughout the year; and consequently that the plaintiffs were at liberty to require the delivery in the month of December of the whole quantity undelivered, or 1280 tons, and so to maintain this action. It is unnecessary to determine whether the plaintiffs' failure to accept, if required, and pay for the entire quantity of 166⅔ tons in any one month, or the delivery of a part only of 166⅔ tons at the plaintiffs' request, assented to by the defendants, would have the effect of putting an end to the contract altogether. But, assuming that the contract may be read as twelve several contracts for the sale and delivery

of 166⅔ tons within twelve successive months, and consequently that the plaintiffs had a right in each successive month to call for the delivery of 166⅔ tons, I am of opinion that, in the absence of an express contract to sell and deliver the quantity undelivered at the plaintiffs' request in the following month, or at some subsequent time, no such contract can be implied, and that the right to enforce delivery on the one hand or acceptance on the other was at an end when, by mutual consent, the time had expired within which, by the express terms of the contract, both delivery and acceptance were to take place.

It is impossible to read a contract to deliver and accept a quantity of iron in the month of February, to be paid for by a bill at four months from the 10th of March, as a contract to deliver and accept it in the month of March, and pay for it by a bill in April, and still less in the month of December, or in the next year, or at any later period within 6 years. It is therefore necessary to imply a new contract. And whether this pretended implication raises a question in this case (as I think it does) for a jury, or a question to be decided by a judge, it seems to me that no such implication can arise where it so materially alters the condition of both parties. The market price of the commodity may rise or fall. The buyer may have entered into sub-contracts which the change in the time of delivery may disable him from performing. The seller may have the commodity on hand, and be obliged to sell it at a loss to put himself in funds, or to keep it at the expense of warehouse rent, and lose the use or the interest of the money with which it was to have been paid for. All these considerations may be provided for by an express contract, but, surely, they preclude an implication which may never have occurred to the mind of the party against whom it is to operate, and which may seriously prejudice his interests and expose him to an indefinite amount of inconvenience and loss.

Besides, it is now established that a new verbal contract cannot be substituted for the original contract, where by the Statute of Frauds such original contract must be in writing. In Chitty on Contracts, 6th ed. p. 104, the rule is thus laid down: "But it is clear that where the contract is one that the Statute of Frauds requires to be in writing, and after it has been reduced into writing, new terms are agreed upon, such new terms must likewise be reduced

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into writing, otherwise they are not receivable in evidence;" and this is well supported by the cases cited in the note: *Moore* v. *Campbell* (1); *Goss* v. *Lord Nugent* (2); *Stead* v. *Dawber* (3); *Marshall* v. *Lynn* (4); overruling *Cuff* v. *Penn.* (5) Here the written contract sued upon is for the delivery of 166⅔ tons of iron in each of ten months specified, to be paid for by a bill at four months on the 10th of each following month. And the contract contended for by the plaintiffs is for the delivery of 1280 tons in the month of December, to be paid for, it must be presumed, at some indefinite time afterwards. This is a totally different contract, and so a new contract, and to be binding in law must have been made in writing. The substantial defence, however, is that no such contract has in fact been entered into. It has not been expressly made, and, for the reasons above assigned, cannot be implied.

Ogle v. *Earl Vane* (6), which has been cited for the plaintiffs, has no application to the present case. There there was no new contract. The question was merely as to the amount of damages, and the plaintiff being entitled to the difference between the contract price and the market price when he had to purchase the iron which the defendant had failed to deliver according to his contract, and having delayed the purchase in the market at the request of the defendant, and the price having risen in the meantime, the defendant was held liable according to the market price at the time when he had himself requested the plaintiff to make the purchase.

In this judgment my Brother Pigott agrees.

MARTIN, B. This is an action for the alleged breach of two contracts—one made on the 25th of October, 1870, the other on the 1st of November, for the sale respectively of 1000 tons of pig iron, in equal quantities, delivered in monthly quantities over 1871, or sooner if required; payment by four months' acceptance, from the 10th of the month following delivery. The cause was tried before my Brother Blackburn, at Leeds, without a jury, when he found

(1) 10 Ex. 323; 23 L. J. (Ex.) 313.
(2) 5 B. & Ad. 58.
(3) 10 A. & E. 57.
(4) 6 M. & W. 109.
(5) 1 M. & S. 21.
(6) Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272.

for the plaintiffs for 649*l.* damages; but he reserved two questions, the first on the construction of the documents and correspondence, the second as to the periods or principle upon which the damages are to be estimated. The first point, and the only matter on the contract argued before us, was as to how the iron was to be delivered, and I think it was to be delivered by equal monthly deliveries, that is to say, 83 tons and a little more upon each contract, or 166 tons and a little more upon both, unless the plaintiffs, the vendees, required it sooner. On the 12th of January, 1871, the defendants delivered 40 tons of iron; on the 15th, 49 tons, 10 cwt.; and on the 17th, 11 tons 10 cwt.; in all 101 tons, being 65 tons short. On the 16th of February the plaintiffs wrote to defendants: "You will oblige by sending no more iron this month." On the 20th the defendants sent 25 tons. On the same day the plaintiffs wrote: "You will greatly oblige us by not sending in any more iron until we write. We are now so full of metal, we do not know where to put it. In another month we hope to be better off, but we really cannot do with more at present," &c.

On the 21st of February the defendants wrote: "We have yours of yesterday, and have instructed our people at Ferryhill to stop delivering until further orders." A number of other letters and a number of deliveries of iron took place during the year, and in the end the defendants delivered only 907 tons of iron, and contend they were under no obligation to deliver more.

Upon the first question reserved by my Brother Blackburn, two questions arise, the first a question of fact, the second, one of law. The question of fact is, what is the meaning of the correspondence? The defendants contend that its meaning is, that the plaintiffs propose that the defendants should not deliver iron during the several months in which the letters were written, and that they should be thereby relieved from the obligation of delivering any iron, or any more than what was actually delivered during each month, or, in other words that, assuming the contract to be for the delivery of about 166 tons of iron per month, the plaintiffs before breach exonerated the defendants from the performance of it.

The plaintiffs, on the other hand, contend that this is not the meaning of the correspondence, but that what it means is, and

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what the defendants could only by possibility understand it to mean, is, that the plaintiffs requested the defendants as a favour and convenience to them, not to press upon them the acceptance of the iron, inasmuch as it was inconvenient to them to receive it, and that there is nothing in the correspondence to shew that the plaintiffs ever intended that the entire quantity of 2000 tons should not be delivered, or that the defendants understood that such was their intention. It would be tedious and almost unintelligible to a hearer or reader to state the reasons why I am clearly of opinion that the plaintiffs' contention is right, and that there is nothing in the correspondence to indicate that the plaintiffs ever proposed, or intended, or suggested that the entire quantity of 2000 tons should not be delivered, or that the defendants ever put it forward as their understanding of it, until the price of iron had risen, in November, when it was their interest not to deliver.

The second question is one of law, and is a most important one —it arises over and over again every day in the ordinary transactions of mankind. It is this: There is a contract for the sale of goods to be delivered, say in January, or upon a day of January. On the day before the delivery is to take place the vendor meets the vendee and says, "It is not convenient for me to deliver the goods in January, or upon the day named, and I will be obliged if you will agree that the goods shall be delivered at a later period," and the vendee assents; or the vendee goes to the vendor, and says, "It is not convenient for me to receive the goods in January, or upon the day named, and will you agree that the delivery shall be postponed?" and the vendor assents; the latter is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the later day. In my opinion, the contention is not well founded. In the first place, I think it is decided by authority. It is impossible to distinguish the case of the application for postponement coming from the vendors, and one coming from the vendee, and the case of *Ogle* v. *Lord Vane*, in the Queen's Bench (1), and in the Exchequer Chamber (2), has decided that where the postponement took place at the request of the vendor, he still continued liable upon the contract. This

(1) Law Rep. 2 Q. B. 275. (2) Law Rep. 3 Q. B. 272.

case, in my opinion, concludes the contention. It was suggested rather than argued, that the right of the plaintiffs to recover was barred by the 17th section of the Statute of Frauds. I think it is not, assuming the legal construction of what took place between the plaintiffs and defendants to be a contract; it was not a contract for the sale of goods, which is the contract provided for by this section, but a contract respecting the delivery of goods already sold, which is not within the section at all. I am therefore of opinion that the plaintiffs are entitled to recover.

The second question reserved by the learned judge is as to the period as to and the principle upon which the damages are to be calculated. I think the same case of *Ogle* v. *Lord Vane* (1) is conclusive as to this also, and shews that the damages were calculated at the trial upon the right principle, viz., upon the market price at the time when the defendants refused to deliver the iron. It was said that this operated with injustice and hardship upon the defendants. I do not agree to this. If the defendants had, as they say they had in one of their letters, stacked the iron for the plaintiffs, the damages would only be the increased price which they got for the iron so stacked, and no hardship would be imposed upon them. If they had not stacked the iron, and had it not to deliver at the time when they were bound to deliver it, they are only called upon to pay what the plaintiffs would have been obliged to pay if they had gone into the market to buy the quantity short delivered. In my opinion, the argument as to injustice and hardship entirely fails.

Rule absolute.

Attorneys for plaintiffs: *Torr & Co., for Middleton & Sons, Leeds.*

Attorneys for defendants: *J. Scott, for Hodge & Harle, Newcastle.*

(1) Law Rep. 2 Q. B. 275; S. C. in Ex. Ch. Law Rep. 3 Q. B. 272.

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—— *Ogle* v. *Lord Vane* (Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272) discussed 305
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—— *Phillips* v. *Foxall* (Law Rep. 7 Q. B. 666) followed - - - - 73
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—— *Thomas* v. *Rhymney Railway Company* (Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. 216) distinguished - - - 137
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CAUSE OF ACTION - - - - 208
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—— Death of servant - - - 88
See Death of Servant.

CEASING OF LIABILITY ON CHARTER—*Shipping—Charterparty—Condition that Charterer's Liability shall cease.*] A charterparty made by plaintiff to defendant contained the following clause:—"Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." In an action brought for demurrage at the port of loading:—*Held*, 1. That the lien extended to demurrage at the port of loading, as well as at the port of discharge. 2. That the ship having been loaded, the charterer could not be sued for demurrage incurred during the loading. Francesco *v.* Massey 101
CERTIFICATE FOR COSTS - - - 16
See Costs under County Court Acts.
CHARTERPARTY—Condition for ceasing of liability - - - - 101
See Ceasing of Liability on Charter.
COMMON LAW PROCEDURE ACT, 1852, s. 16.
See Foreign Corporation. [149
COMMON LAW PROCEDURE ACT, 1860, s. 25. 19
See Bond.

COMPOSITION—*Bankruptcy Act*, 1869, *s.* 126—*Resolution to accept Composition—Pleading.*] A resolution, under the Bankruptcy Act, 1869, s. 126, by the requisite majority of creditors to accept in satisfaction from the debtor a composition upon the debts due, payable at a future time or by instalments, may be pleaded in bar to an action for the original debt, brought before any default on the debtor's part by a creditor bound by the resolution.—*Edwards* v. *Coombe* (Law Rep. 7 C. P. 519); *In re Hatton* (Law Rep. 7 Ch. 723), discussed. *Slater* v. *Jones*. *Capes* v. *Ball* - 186
CONCEALMENT OF MATERIAL FACT—*Marine Insurance—Concealment—Election to avoid Contract—Delivering out Policy.*] The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria* without disclosing to the defendants certain information in his possession, which it was material that they should know (October 10th). In so doing he acted in good faith, supposing from inquiries that he had made that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 13th) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14th or 15th). Upon receiving news of the loss of the vessel they gave notice to the plaintiff that they did not consider the policy binding on them (October 20th). On the trial of the action upon the policy, the learned judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion, whether the defendants had elected to go on with the policy. The jury having found that the defendants did not so elect, and a rule for a new trial on the ground of misdirection having been obtained and afterwards made absolute in the court below:—*Held* (reversing the judgment of the Court of Exchequer), that this direction was right; and that there being no election in fact, and no evidence that the plain-

CONCEALMENT OF MATERIAL FACT—*contd.*
tiff had been prejudiced by the defendants not electing earlier to disaffirm the policy, the defendants were not estopped from denying its validity, nor was it material to consider whether their conduct in delivering out the policy without a protest had been such as to entitle the plaintiff to consider it as an election. Morrison *v.* The Universal Marine Insurance Company **40, Ex. Ch. 197**

CONDITION FOR CEASING OF LIABILITY — Charterparty - - - **101**
See Ceasing of Liability on Charter.

CONDITIONS OF SALE—*Vendor and Purchaser—Power to rescind—Imperfect Abstract—Objections not disclosed by Abstract.*] The defendant, in March, 1868 (as surviving devisee in trust), sold by auction to the plaintiff's testator land and tolls (lots 3 and 4) under certain conditions. Condition 3 provided that the vendors were to deliver to the purchaser an abstract of title within seven days from the sale, the purchaser was to make his objections and requisitions within twenty-one-days of the delivery of the abstract, and all objections and requisitions not made within that time were to be taken to be waived; "and in case any purchaser shall make any objection or requisition on the title of the respective lots which the vendors shall be unwilling or unable to answer or comply with, the vendors reserve to themselves the option, notwithstanding they may have attempted to answer or comply with such objections or requisitions, or may have partly done so, at any time to rescind the contract for sale of the lot or lots, in respect of which such objections or requisitions shall be made, upon repaying or tendering to such purchaser or purchasers the deposit money, without interest, costs, or expenses, in full of all claims or demands for the investigation of title or otherwise."—An abstract was delivered, on which the purchaser made and insisted on two objections, of which one (as to lot 3) was frivolous, and the other (as to lot 4) was an objection as to quantity, in respect of which he was, under another condition, only entitled to compensation, which was offered. —The defendant thereupon, on the 24th of July, filed a bill in Chancery for specific performance, and the purchaser on the 23rd of September put in an answer, in which he reiterated his objections, and also objected to complete on the ground of certain transactions affecting lot 4 which had not been disclosed by the abstract.—These transactions were known to the vendor at the time of the sale, and were intentionally, but bonâ fide omitted from the abstract, as it was supposed they did not affect the title. The contents of the deeds relating to these transactions were first communicated to the plaintiff by an affidavit, made by the defendant in this action under an order for discovery; but the deeds were previously known to his attorney, who had been a clerk in the office where they were prepared.—On the 2nd of December the purchaser died; on the 26th of January, 1869, the vendor's solicitor wrote to the solicitor of the purchaser requesting particulars of the probate of his will; and on the 12th of February the vendor (the now defendant) announced his intention to rescind, and afterwards formally rescinded the contract and tendered the deposit.—An order was made in the suit that the defendant, the plaintiff

CONDITIONS OF SALE—*continued.*
in the suit, should revive it or that the bill should be dismissed without costs, and the suit not being revived, the bill was dismissed accordingly.—In an action brought by the plaintiff against the defendant for not deducing a good title, and for fraudulently representing that he had and would deduce a good title, the arbitrator, to whom the facts were referred, having negatived fraud:—*Held* by the Court below (Kelly, C.B., Martin, B., and Cleasby, B.; Bramwell, B., dissenting), that the defendant was entitled to rescind. Error being brought:—*Held* by the Court of Exchequer Chamber (Blackburn, Keating, Brett, Archibald, and Honyman, JJ., Grove, J. dissenting), that the defendant had, by filing his bill, elected not to rescind on any of the original objections, but that the third condition applied to all objections to the title whether appearing on the abstract or not; that the defendant was, therefore, entitled to rescind on account of the objection as to lot 4 raised by the answer, and founded on the transactions which were omitted from the abstract; and that the delay from the filing of the answer on the 23rd of September, 1868, to the 12th of February, 1869, was not unreasonable.—*Quære* whether, if an action had been brought against the defendant for breach of his contract to deliver a true abstract, the plaintiff could, under the circumstances, have recovered substantial damages. Gray *v.* Fowler - - - **Ex. Ch. 249**

2. —— *Vendor and Purchaser — Waiver of Objections — Forfeiture of Deposit.*] The defendant (with A., since deceased) sold a farm to the plaintiff under conditions of sale; by the 3rd condition it was stipulated that the vendors should deliver an abstract of title within seven days, and "all objections and requisitions not stated in writing and delivered to the vendors' solicitor within fourteen days from the delivery of the abstract shall be considered as waived, and in this respect time shall be of the essence of the contract;" and by the 14th condition, "if the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors," who were to be at liberty to resell and recover any deficiency and the cost of resale from the purchaser. The plaintiff paid a deposit of 300*l.* An abstract of title was delivered within seven days; and from the abstract it appeared that the vendors sold as trustees under a will which devised the estate to them on trust to pay the income to F. S., the testator's son-in-law, for life, or to permit him to receive the same, and, after his decease, on trust to sell the estate and hold the produce "upon the trusts for the children of the said F. S. as therein mentioned;" it was further stated in the abstract that F. S. would join in conveying the property.—It was objected by the purchaser, but not till after the expiration of fourteen days from the delivery of the abstract, that F. S. being still alive, the vendor's power of sale had not arisen.—It subsequently appeared that the trusts of the will as to the produce of the sale were for the benefit of such of the children of F. S. by H. S., the testator's daughter, who should be living at testator's death, to be paid to them at twenty-one, or, if daughters, at twenty-one or on marriage, with limitations over

CONDITIONS OF SALE—*continued.*
for the benefit of survivors on the death of any child under twenty-one or before marriage. There were eight children of F. S. and H. S. living at the testator's death, of whom some had since married and settled their shares.—In an action brought by the purchaser to recover his deposit:—*Held*, that he was entitled to succeed (by Kelly, C.B.) on the ground that no complete abstract had been delivered, and that therefore the time limited for taking objections had never commenced running; (by Martin and Pollock, BB.) on the ground that the 14th condition did not apply to the case of the vendors being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title. Want *v.* Stallibrass - 175

CONTRACT—Breach—Measure of damages 122, [305

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CONVERSION—Evidence - - - 126

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CONVICTION—Proof - - - - 69

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COPYRIGHT—Infringement - - - 1

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—— Succession duty - - - - 233

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COSTS—County Court Acts - - - 16

See Costs under County Court Acts.

—— Libel—Action - - - - 69

See Evidence of Conviction.

COSTS ON LOWER SCALE - - - 16

See Costs under County Court Acts.

COSTS UNDER COUNTY COURT ACTS—*Costs—Writ of Trial—Nature of Action—Costs of lower Scale—Certificates—Directions to Masters, Hilary Term*, 1853.] In an action of debt the writ was indorsed for 50*l.* 3*s.*, which was reduced upon the trial, by a set-off, to 15*l.*, and a verdict was entered for the plaintiff for the latter amount, the judge certifying, under the County Courts Act, 1867, s. 5, that there was sufficient reason for bringing the action in the superior Court. He did not certify on the postea that the "cause was proper to be tried before him":—*Held*, that in the absence of the latter certificate, the plaintiff's costs were to be taxed under the 7th direction to the masters, Hilary Term, 1853, upon the lower scale, the case not being one in which, "by reason of the nature of the action," no writ of trial could be issued. Smith *v.* Haley - - 16

COUNTY COURT—Costs—Certificate - 16

See Costs under County Court Acts.

—— Jurisdiction - - - - 208

See County Court Jurisdiction.

COUNTY COURT ACT, 1867—s. 5 - - 16

See Costs under County Court Acts.

COUNTY COURT JURISDICTION—*Cause of Action—31 & 32 Vict. c.* 142, *s.* 1—*Prohibition.*] The plaintiff and defendant dwelt and carried on business in the districts of the B. and L. county courts respectively. The plaintiff offered verbally at B. to buy of the defendant certain cotton. The defendant accepted that offer at L., signing a sold note, which he forwarded to the plaintiff at B. The cotton was to be and was delivered at L. The plaintiff alleged that there had been short delivery, and entered a plaint for damages, by leave of the registrar, in the B. county court. Upon motion for a writ of prohibition:—*Held*, that the offer at B. was a part of the cause of action, and therefore, that the judge had jurisdiction under 30 & 31 Vict. c. 142, s. 1. Green *v.* Beach [208

COVENANT NOT TO TRADE—Distance - 32

See Measurement of Distance.

CUSTOM OF STOCK EXCHANGE—*Principal and Agent—Indemnity of Agents—Stock Exchange Usage — Defaulting Broker.*] The plaintiffs, brokers on the London Stock Exchange, bought for the defendant (who was not a member of the Stock Exchange), certain shares for the account of the 15th of July, 1870, and on that day, by his instructions, carried them over to the account of the 29th of July, and paid differences amounting to 1688*l.* The defendant and various others, principals of the plaintiffs, not having paid the amount due from them in respect of contracts for the 15th of July, the plaintiffs became defaulters, and on the 18th, in conformity with the rules of the Stock Exchange, they were declared defaulters, and their transactions were closed, and accounts were made up at the prices current on that day. On the closing of the accounts a further sum became due from them in respect of differences upon the contracts carried over by them for the defendant. In an action to recover this sum and the 1688*l.*:—*Held* (reversing the decision of the Court below), that the defendant was not liable for anything beyond the 1688*l.*, there being no implied promise by a principal to his agent to indemnify him for loss caused, not by reason of his having entered into the contracts which he was authorized to enter into by the principal, but by reason of his own insolvency. Duncan *v.* Hill. The Same *v.* Beeson - - - Ex. Ch. 242

CUSTOM OF TRADE—Stay and trade Ex. Ch. 154

See Stay and Trade.

DAMAGES—Value of life - Ex. Ch. 221

See Evidence of Value of Life.

DAMAGES FOR BREACH OF CONTRACT—*Evidence—Onus of Proof.*] The defendants, by charterparty, agreed with the plaintiff that their ship should, at a specified time, load 1300 tons of coal in the river Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had, in consequence, first to hire other vessels at an advanced freight, and, secondly, to buy 1300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was

DAMAGES FOR BREACH OF CONTRACT—*cont.*
not disputed; but it was not directly proved that there had been an equivalent rise at Havre;—*Held*, that the fact of the plaintiff having paid the additional price was primâ facie evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover. Featherston *v.* Wilkinson - - 122

2. —— *Contract of Sale—Monthly Deliveries—Forbearance of Vendor at Request of Vendee—Statute of Frauds* (29 *Car.* 2, *c.* 3) *s.* 17.] The defendants in October, 1870, contracted to sell to the plaintiffs 2000 tons of iron, "delivery in monthly quantities [of 166⅔ tons] over 1871, or sooner if required," payment by four months' acceptance from the 10th of the month following delivery. In January, 1871, 101 tons were delivered, but the plaintiffs did not then demand the delivery of the balance of the monthly quantity. In February, 1871, and at several periods between that date and December, 1871, the plaintiffs requested the defendants to forbear from delivery of more iron under the contract, and the defendants accordingly only made partial deliveries during the several months of 1871 up to and including November. In December the plaintiffs required delivery of the residue of the whole 2000 tons, and, upon the defendants' refusal, brought an action for non-delivery:—*Held* (by Kelly, C.B., and Pigott, B., Martin, B., dissenting), that the plaintiffs having themselves requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2000 tons in December, and were therefore not entitled to recover:—By Martin, B., first, that the original contract had not been put an end to by the plaintiffs' application to the defendants not to deliver full monthly quantities between February and November, 1871, and that the defendants were bound to deliver the whole 2000 tons under their contract; and secondly, that the proper measure of damages was the difference between the contract and market prices in December, 1871, when the defendants refused to deliver the iron. —*Ogle* v. *Lord Vane* (Law Rep. 2 Q. B. 275; Law Rep. 3 Q. B. 272), discussed. Tyers *v.* The Rosedale & Ferryhill Iron Company, Limited [305

DAMAGES, MEASURE OF—Breach of contract [122, 305
See Damages for Breach of Contract. 1, 2.

DEATH OF SERVANT—*Negligence causing Death—Actio personalis moritur cum personâ—Master and Servant.*] A master cannot maintain an action for injuries which cause the immediate death of his servant.—Declaration against defendant for injuries caused to E., plaintiff's "daughter and servant," by the negligent driving of defendant's servant, by reason whereof she afterwards died; claiming as special damage the loss of E.'s services, and her burial expenses.—Pleas, 3, that E. was killed on the spot.—4. That the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted. On demurrer to these pleas:—*Held*, first (by Kelly, C.B., and Pigott, B.; Bramwell, B., dissenting), that the 3rd plea was good; secondly (by the whole Court), that the 4th plea was bad. Osborn *v.* Gillet - - 88

DEBTORS ACT, 1869, s. 5 - - - 23
See Order for Payment by Married Woman.

—— s. 6 - - - - - 214
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DELIVERY OF POLICY—Concealment 40, [Ex. Ch. 197
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DEMURRAGE—Lien—Charterparty - 101
See Ceasing of Liability on Charter.

DEPOSIT—Conditions of sale - - 175
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DESCRIPTION—Bill of sale - - 80
See Affidavit with Bill of Sale.

DEVIATION—Policy during stay and trade
See Stay and Trade. [Ex. Ch. 154

DIRECTIONS TO MASTERS—Hilary Term, 1853 [16
See Costs under County Court Acts.

DISCHARGE OF SURETY—*Alteration of the Guaranteed Contract—Material Alteration.*] Declaration on a bond given to the plaintiff by the defendant, which recited that by an agreement of even date the plaintiff had agreed to admit J. into his service as "clerk and traveller" (not further stating the terms of the agreement), and was conditioned for J.'s accounting for and paying over to the plaintiff all moneys which he might receive on plaintiff's account; the breach alleged being that J. had received moneys for the plaintiff which he had not accounted for or paid over.—Pleas, on equitable grounds. 2. That the original agreement between the plaintiff and J. was that it should be terminable by one month's notice; and that the plaintiff and J. afterwards, and before the defaults sued for, made it terminable by three months' notice, without the defendant's consent.—3. That before the defaults sued for, J. had committed other defaults of the same kind; that the plaintiff had, with knowledge of those defaults, continued to employ J. in his service without notice to the defendant; and that the defaults sued for were committed during such continuance of the service. On demurrer to these pleas:—*Held*, first (Martin, B., doubting) that the second plea was bad, on the ground that it did not shew that the term as to the period of notice was made part of the defendant's contract, and that the alteration alleged did not in fact materially add to the defendant's risk.—Secondly, that the third plea was good, on the authority of *Phillips* v. *Foxall* (Law Rep. 7 Q. B. 666). Sanderson *v.* Aston - - - - 73

—— Joint bond - - - - 81
See Release of Joint Debtor.

DISTANCE, MEASUREMENT OF - Ex. Ch. 32
See Measurement of Distance.

DIVERSION OF WATER—*Easement—Natural and Artificial Stream—Riparian Owner.*] A natural stream divided itself at a point called E. into two branches; one branch ran down to the river Irwell; the other passed into a farm-yard, where it supplied a watering-trough, and the overflow from the trough was formerly diffused

DIVERSION OF WATER—*continued.*
over the ground, and found its way ultimately into the Irwell. The second branch appeared to have been made by artificial means, but was of immemorial age.—In 1847 W., the owner of the land on which the watering-trough stood, and thence down to the Irwell, collected the overflow into a reservoir, and conducted it by a culvert to a mill situated on the banks of the Irwell.—In 1865 W. became owner of all the rest of the land through which the second branch flowed.—In 1867 he sold the mill, with all water rights, to the plaintiff.—In an action brought by the plaintiff against a riparian owner on the stream above E. for obstructing the flow of the water:—*Held*, that the plaintiff was entitled to maintain the action. Holker *v.* Poritt - - - - 107

DRUNKENNESS—*Contracts Void and Voidable—Ratification.*] The contract of a man, too drunk to know what he is about, is voidable only, and not void, and therefore capable of ratification by him when he becomes sober. Matthews *v.* Baxter - - - - - - 132

DUTY TO FENCE—*Railway Company—Owner and Occupier of adjoining Land—Licensee of Occupier*—8 & 9 *Vict. c.* 20, *s.* 68.] The plaintiff hired of the occupier of some land adjoining the defendants' line of railway a stable for his horse. The horse was allowed to graze during the day on the land. One night it escaped from the stable on to the land, and thence, through a defective fence, on to the defendants' line, where it was run over and killed by a train. In an action for the value of the horse:—*Held*, that the plaintiff was entitled to the benefit of 8 & 9 Vict. c. 20, s. 68, whereby railway companies are bound to maintain sufficient fences for the protection of the cattle of the "owners or occupiers" of land adjoining their line, and the defendants were therefore liable. Dawson *v.* The Midland Railway Company - - - - - - 8

EASEMENT—Water—Diversion - - 107
See Diversion of Water.

ELECTION TO AFFIRM CONTRACT—Delivery of policy - - - 40, Ex. Ch. 197
See Concealment of Material Facts.

ESTATE TAIL—Will - - Ex. Ch. 160
See General Intent.

ESTOPPEL—Delivery of policy—Concealment 40, [Ex. Ch. 197
See Concealment of Material Facts.

ESTOPPEL BY ACCEPTANCE—*Bill of Exchange—Acceptance, what it admits—Unauthorized Indorsement by one of two Partners.*] B., a member of the firm of W. & B., attorneys and solicitors, drew and indorsed for value to the plaintiff in the partnership name a bill of exchange payable to the order of W. & B., which the defendant accepted without consideration. The indorsement was in respect of an entirely private matter of business between B. and the plaintiff, unconnected with partnership purposes; B. had no authority from W. either to draw or indorse the bill. In an action by the indorsee against the acceptor, the defendant having traversed the indorsement:—*Held*, that the defendant was not estopped from shewing that there had been no indorsement in fact by the firm. Garland *v.* Jacomb Ex. Ch. 216

EVIDENCE—Conversion - - - 126
See Evidence of Conversion.

—— Conviction - - - - 69
See Evidence of Conviction.

—— Damages—Contract - - - 122
See Damages for Breach of Contract. 1.

—— Negligence—Railway company Ex. Ch. 283
See Evidence of Negligence.

—— Skilled witness—Duration of life Ex. Ch. 221
See Evidence of Value of Life.

—— Value of life - - Ex. Ch. 221
See Evidence of Value of Life.

EVIDENCE OF CONVERSION—*Preventing Removal of Goods.*] The plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession, and afterwards went to M.'s house to remove them. Upon his arrival at the house he was met by the defendant, M.'s landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It was then after sunset, and therefore too late in the day to distrain, and the defendant intended to prevent the plaintiff from removing the goods, with a view of distraining on the day following. The plaintiff continued in possession of the goods, but made no attempt actually to remove them; and, except by intimating his intention to prevent their being removed, the defendant did not take possession of, or assume dominion over, them. In an action of trover:—*Held* (by Kelly, C.B., Bramwell and Pollock, BB., Martin, B., dissenting), that there was no evidence of conversion:—(By Bramwell, B.) That an actual prevention by force of the removal of the goods would not have amounted to a conversion. England *v.* Cowley - - 126

EVIDENCE OF CONVICTION—14 & 15 *Vict. c.* 99, *s.* 13.] The 13th section of 14 & 15 Vict. c. 99, which allows a criminal record to be proved by a certificate of the officer having custody of the record, omitting the formal parts, applies to proof in civil as well as in criminal proceedings.—Where a person indicted for libel is acquitted, and becomes entitled to his costs under 6 & 7 Vict. c. 96, s. 8, he may recover them from the prosecutor by action. Richardson *v.* Willis - - - 69

EVIDENCE OF NEGLIGENCE — *Railway Company—Communication between the Passengers and the Company's Servants—Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 22.] The Regulation of Railways Act, 1868, s. 22, enacts that "every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping," means of communication between the passengers and the servants of the company in charge of the train:—*Held*, that the section applies to every passenger train which is intended to travel more than twenty miles without stopping.—In an action for personal injuries, brought against a railway company by a passenger in a train which was within the meaning of the Act, it appeared that there were no such means of communication as were pre-

EVIDENCE OF NEGLIGENCE—*continued.*

scribed by the Act; it also appeared that the adoption of such means of communication had been recommended by the Board of Trade, and that they were in fact adopted and used by other railway companies, and also by the defendants themselves in other trains. Some evidence was also given that if such means of communication had existed, the accident might have been prevented:—*Held*, that in determining whether, in the case of a passenger train intended to run more than twenty miles without stopping, the company was guilty of negligence in not providing means of communication between the passengers and the company's servants, the provision contained in s. 22 of the Regulation of Railways Act, 1868, was to be taken into account.—*Quære*, whether this would be so in the case of a train not intended to run twenty miles without stopping. BLAMIRES *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - **Ex. Ch. 283**

EVIDENCE OF VALUE OF LIFE—*Action under Lord Campbell's Act* (9 & 10 *Vict. c.* 93)—*Value of Life of Deceased—Value of an Annuity according to Carlisle Tables—Evidence—Skilled Witness.*] At a trial of an action under 9 & 10 Vict. c. 93, brought for the benefit of the mother, widow, and children of R., claiming damages from the defendants for having by their negligence caused the death of R., it was proved that the deceased was under a covenant to pay his mother an annuity of 200*l.* during their joint lives. A witness was then called for the plaintiff who stated that he was an "accountant," and that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to certain tables used by insurance offices called the "Carlisle Tables," as to the average duration of life of two persons of the ages of the mother and son respectively, and as to the price for which an annuity for the mother's life could be bought. The admissibility of this evidence was objected to by the defendants, and was ruled to be admissible.—In summing up the learned judge directed the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what was the sum which would purchase an annuity of 200*l.* for a person of her age, according to the average duration of human life; and that in calculating the widow's and children's damages they might, if they thought proper, take as a guide the period of the probable duration of life of a person of the age of the deceased. On the argument of a bill of exceptions tendered to the ruling of the learned judge in admitting the evidence and to his direction to the jury:—*Held*, first (by Blackburn, Keating, Grove, and Archibald, JJ.), that the witness was competent to give evidence as to the probable duration of life and the price of the annuity, although not an actuary; and (Brett, J., dissenting), that the evidence was relevant and properly admitted.—Secondly, by the whole Court, that the direction to the jury as to the calculation of the mother's damages was wrong.—By Blackburn, Keating, Grove, Archibald, and Honyman, JJ. The direction was erroneous in not noticing the circumstance that the annuity of the mother was on the joint lives of herself and her son, and that it was only secured by the personal covenant of her son.—By Honyman, J. The direction was also erroneous in authorizing the jury to find the term for which an annuity is to be purchased, solely by reference to the average duration of life, without taking into account the state of health of the particular annuitant.—By Brett, J. The only legal direction to the jury would have been that they ought not to attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they considered, under all the circumstances, a fair compensation; and the direction was therefore erroneous, inasmuch as it left it open to the jury to give as damages the utmost amount which they might think was an equivalent for the pecuniary mischief done.—Thirdly (by Blackburn, Keating, Grove, and Archibald, JJ., Brett, J., dissenting), that the direction as to the mode of calculating the damages recoverable by the widow and children might be construed as meaning that the probable duration of life of a person of the same age, and in the same circumstances as the deceased, was an element to be taken into the calculation of the jury with the rest of the evidence, and being so construed was correct. ROWLEY *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY - - - - **Ex. Ch. 221**

EVIDENCE OF VALUE OF LIFE—*continued.*

FENCES—Railway company - - **8**
See DUTY TO FENCE.

"FOR DEFAULT OF SUCH ISSUE" **Ex. Ch. 160**
See GENERAL INTENT.

FOREIGN CORPORATION—*Service of Writ—Service on Officer in England—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 16.] The defendants were a Scotch corporation, with running powers over an English railway to Carlisle, and their only officer in England was a booking clerk at a station at Carlisle, whose sole duty was to issue tickets to travellers. The station at Carlisle was wholly under the control of the English company, but the defendants had use of it at a rental payable to that company. The defendants' head office was in Scotland:—*Held*, that the booking clerk was not a head officer or clerk of the defendants, who could be properly served with a writ issued against the defendants. —*Newby* v. *Von Oppen* (Law Rep. 7 Q. B. 293) distinguished. MACKERETH *v.* THE GLASGOW AND SOUTH WESTERN RAILWAY COMPANY - **149**

FORFEITURE OF DEPOSIT - - - **175**
See CONDITIONS OF SALE.

FRAUDULENT CONVEYANCE—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *subs.* 2.] The defendant received from M., a member of a trading firm, a bill of lading for brandy, for the purpose of landing and warehousing it, which he did, entering the brandy (at M.'s request) in his own name, and paying charges amounting to 47*l.* Afterwards, and whilst he still had the bill of lading in his possession, an acceptance which had been given by the firm to the defendant for the hire of a ship falling due, and the firm not being able to meet it, the defendant consented to take M.'s acceptance at seven days for a balance of account, including the hire and the 47*l.*, upon receiving M.'s authority to sell the brandy, if the bill were not met. This acceptance not being

FRAUDULENT CONVEYANCE—*continued.*
met, the defendant sold the brandy. The firm were afterwards adjudicated bankrupts, and the trustee sued the defendant in trover for the value of the brandy. The transaction was bonâ fide, but the brandy formed in fact the whole property of the firm:—*Held*, that the transaction under which the defendant obtained power to sell the brandy was not a "fraudulent conveyance, gift, delivery, or transfer," within the meaning of the Bankruptcy Act, 1869, s. 6, subs. 2. PHILPS, *v.* HORNSTEDT - - - - - 26

GENERAL INTENT—*Will—Estate to be enjoyed by one Person—"All and every other the Issue of my Body"—"Other the Issue"—Words of Exclusion or Completion—"For default of such Issue."*] A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F. successively in tail male; and for default of such issue to R., the second son of his son, for life, with remainder to the first and other sons of R. successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born, successively in tail male; and for default of such issue to his daughter I. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter I., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth and fifth, and other daughter or daughters of his son successively, and in remainder one after another, and to the heirs male of their bodies; and for default of such issue, "to the use and behoof of all and every other the issue of my body," and for default of such issue to his right heirs. The will also contained a wish that the estates should be retained in the hands of one person and should not be dispersed, and a provision that any female who inherited should, with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:—*Held* (affirming the judgment of the Court below), that there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general, to which his son then became entitled.—This remainder descended to F. who duly executed a disentailing deed. He devised the estates to the defendant's father, from whom it descended to the defendant. In actions of ejectment (a) by persons claiming as issue of the body of the testator as joint tenants per capita, at the time the estates vested in possession, (b) by the heiress in tail general of the testator at the same period, and (c) by the heir in tail of the testator at his death, those being excluded who came within the particular limitations:—*Held* (affirming the judgment of the Court below), that the defendant was entitled to judgment. ALLGOOD *v.* BLAKE. ROACH *v.* BLAKE. REED *v.* BLAKE - - - - 160

GUARANTEE—Discharge of surety - 73
See DISCHARGE OF SURETY.
—— Joint bond—Discharge of surety - 81
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HOTEL—Manager - - - - 135
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HOTEL COMPANY—Licence - - 135
See INNKEEPER.
HUSBAND AND WIFE—Order for payment by wife - - - - - 23
See ORDER FOR PAYMENT BY MARRIED WOMAN.

INFERIOR COURT—New trial—Motion—Notice
See NEW TRIAL IN INFERIOR COURT. [71
INFRINGEMENT OF COPYRIGHT—*Appropriation of Pictures—Book—Sheet of Letterpress—5 & 6 Vict. c. 45, ss. 2, 15.*] The plaintiffs are proprietors of a weekly periodical called "*Punch*." Between the years 1849 and 1867 they published in nine several numbers nine cartoons, with descriptive writing underneath them with reference to the Emperor Napoleon III. In 1871 the defendant published a work called "The Man of his Time," consisting, first, of the "Story of the Life of Napoleon III., by James M. Haswell;" and, secondly, of "The same Story as told by Popular Caricaturists of the last Thirty Years." Among the caricatures in part 2, were copies in a reduced form, sometimes with and sometimes without the descriptive writing, of the nine cartoons above mentioned. No consent from the plaintiffs to this reproduction had been obtained. In an action by them for infringement of their copyright in the several books or "sheets of letterpress" containing the cartoons:—*Held*, that a substantial part of the plaintiff's books, or sheets of letterpress, had been appropriated, and that they were entitled to recover. BRADBURY *v.* HOTTEN - - - 1
INNKEEPER—*Hotel Company—Holder of Licence.*] The plaintiff having lost his goods at a hotel, of which a company were proprietors, sought to recover their value in an action against the paid manager, in whose name the justices' licence had been granted:—*Held*, that the company were the real "innkeepers;" and, therefore, that the action was not maintainable. DIXON *v.* BIRCH - - - - - - 135
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See BOND.
INSURANCE, MARINE—Concealment
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LIEN—Ship—Charterparty - - - 101
See Ceasing of Liability on Charter.
LIFE—Value—Evidence - - Ex. Ch. 221
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LLOYD'S LIST, KNOWLEDGE OF—Underwriter
[40, Ex. Ch. 197
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LORD CAMPBELL'S ACT—Damages Ex. Ch. 221
See Evidence of Value of Life.

MANAGER OF HOTEL - - - 135
See Innkeeper.
MARINE INSURANCE—Concealment
[40, Ex. Ch. 197
See Concealment of Material Facts.
—— Stay and trade - - - Ex. Ch. 154
See Stay and Trade.
MARRIED WOMAN—Order for payment - 23
See Order for Payment by Married Woman.
MASTER AND SERVANT—Death of servant—Action - - - - 88
See Death of Servant.
—— Railway company - - - 137
See Negligence of Servant.
MEASURE OF DAMAGES—Breach of contract
[122, 305
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—— Value of life - - - Ex. Ch. 221
See Evidence of Value of Life.
MEASUREMENT OF DISTANCE—"*As the Crow flies," or by nearest Mode of practicable Access—Covenant not to carry on Trade within a given Distance.*] The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on business within half a mile if the distance were measured in a straight line, "as the crow flies," but not within half a mile if the distance were measured by the nearest mode of practicable access:—*Held* (affirming the judgment of the Court below), that there had been a breach of the covenant. Mouflet *v.* Cole Ex. Ch. 32
METROPOLIS LOCAL MANAGEMENT ACT, 1856, s. 105 - - - Ex. Ch. 174
See Recovery of Paving Expenses.
METROPOLIS LOCAL MANAGEMENT ACT, 1862, s. 77 - - - - Ex. Ch. 174
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NATURAL STREAM—Easement - - 107
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NEGLIGENCE—Death of servant - - 88
See Death of Servant.
—— Railway—Running powers - - 137
See Negligence of Servant.
—— Railway company—Communication with guard - - - Ex. Ch. 283
See Evidence of Negligence.
NEGLIGENCE OF SERVANT—*Railway Company—Liability of one Company for Negligence of Another with Running Powers—Parliamentary Agreement as to Traffic.*] The N. Company had statutory authority to run over a portion of the defendants' line, paying a certain toll to the defendants. The signals at the point of junction between the two lines were under the control of the defendants. Owing to the servants of the N. Company negligently disobeying these signals, a train of the N. Company ran into a train of the defendants in which the plaintiff was, causing him damage. There was no negligence on the part of any of the defendants' servants. In an action for injuries sustained, brought by the plaintiff against the defendants:—*Held*, that he was not entitled to recover.—*Great Western Ry. Co.* v. *Blake* (7 H. & N. 987); *Thomas* v. *Rhymney Ry. Co.* (Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. 266), considered and distinguished. Wright *v.* The Midland Railway Company - - 137
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NEW TRIAL IN INFERIOR COURT—*Practice—Inferior Court—Motion for New Trial in Court of Passage.*] In cases tried before an inferior Court a motion for a new trial, or on leave reserved, cannot be made in this Court unless either counsel moving was present at the trial, or the judge's notes are produced with an affidavit verifying his signature; and in any case the judge's notes, so verified, must be produced on the argument of the rule.—The notes, if erroneous or defective, cannot be corrected by affidavit. Welsh *v.* Mercer 71
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ORDER FOR PAYMENT BY MARRIED WOMAN —*continued.*
under the Debtors Act, 1869, s. 5, may be made upon a married woman.—An order for payment under s. 5 may be made without any proof of means. DILLON *v.* CUNNINGHAM - - 23

"OTHER" - - - - Ex. Ch. 160
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"OWNERS OR OCCUPIERS" - - 8
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PAYMENT BY INSTALMENTS—Bond - 19
See BOND.

PAYMENT INTO COURT—Bond - - 19
See BOND.

PAYMENT TO ADMINISTRATOR—*Payment prior to Letters of Administration being granted.*] An annuity was directed by will to be paid to H. whilst living, by equal half-yearly payments, and a proportionable part of the annuity to be computed to the day of H.'s death, from the last preceding day of payment "to the executors and administrators" of H. A proportionate part, after H.'s death, was paid to the husband of H., but before he had administered to her estate, and he died without having done so, leaving his son his executor. The son administered to H.'s estate, and claimed the proportionate part of the annuity: —*Held*, that the payment to H.'s husband was not a good legal payment, and that the son might recover the money.—*Mitchell* v. *Moorman* (1 Y. & J. 21) followed.—*Semble*, per Kelly, C.B., that the payment was not a good equitable payment. MITCHELL *v.* HOLMES - - - - 119

PENSION — *Grant of Annuity — Resolution not under Seal—Power to vary Pension—Lee River Navigation Improvement Act* (13 & 14 *Vict. c. ix.*).] By the Lee River Navigation Improvement Act, 1850, s. 76, it is enacted that "it shall be lawful for the trustees [of the River Lee] from time to time to pay and allow to any servant whose services may . . . no longer be required, such annuity or other allowance as . . . may in the judgment of the trustees be reasonable and proper, and the trustees may, from time to time, pay and allow such annuity or allowance out of the moneys which may come to their hands," by virtue of certain recited Acts and of that Act. The trustees, acting under this section, by resolution not under seal, granted to a retired servant an annuity of 300*l.* a year :— *Held*, that the annuity so granted could not after the servant's retirement be reduced in amount. MARCHANT *v.* THE LEE CONSERVANCY BOARD - - - - - - 290

PLEADING—Bill of exchange—Alteration 171
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—— Composition - - - - 186
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PRINCIPAL AND AGENT—Indemnity [Ex. Ch. 242
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PRINCIPAL AND SURETY—Discharge of surety [73
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—— Joint bond—Release - - - 81
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PRIORITY OF PATENT—*Patent—Priority in actual Sealing—Date of Application*—15 & 16 *Vict. c.* 83, *s.* 24.] Two patents for the same invention were applied for on the 20th and 23rd of July, 1867, respectively. The patent applied for on the 23rd of July was actually sealed before that applied for on the 20th of July, but each patent was dated as of the day of application :— *Held* that under the 15 & 16 Vict. c. 83, s. 24, the patents took effect as upon the days on which they were applied for respectively, and therefore acts done by virtue of the patent applied for on the 23rd of July were infringements of the patent applied for on the 20th of July. SAXBY *v.* HENNETT - - - - - - 210

PROOF OF CONVICTION - - - 69
See EVIDENCE OF CONVICTION.

PROSECUTION OF ACTION—*Debtors Act*, 1869, *s.* 6—*Arrest of Defendant—Detention after Final Judgment.*] A defendant who has been arrested and imprisoned under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6, on the ground that his absence from England will prejudice the plaintiff "in the prosecution of his action," cannot be kept in prison after final judgment has been signed. HUME *v.* DRUYFF - - - 214

RAILWAY—Duty to fence - - - 8
See DUTY TO FENCE.

RAILWAY COMPANY—Duty to fence - 8
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—— Negligence - - - - 137
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—— Negligence—Communication with guard [Ex. Ch. 283
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—— Superfluous land - - - 294
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RATING—Water-rate—Rent - Ex. Ch. 196
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RECOVERY OF PAVING EXPENSES—*Metropolis Local Management Acts*, 1856 & 1862 (18 & 19 *Vict. c.* 120, *s.* 105; 25 & 26 *Vict. c.* 102, *s.* 77)—

RECOVERY OF PAVING EXPENSES—*continued. Apportionment Payable by Future Owners—Charge on Land.*] The assessments for paving expenses apportioned by the vestry or district board under s. 77 of the Metropolis Local Management Act, 1862 (25 & 26 Vict. c. 102), are a charge upon the premises in respect of which they are assessed; and the amount may be recovered from the future owners of such premises, although there has been no arrangement to accept payment by instalments. THE PLUMSTEAD BOARD OF WORKS *v.* INGOLDBY [63, Ex. Ch. 174

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REGULATION OF RAILWAYS ACT, 1868, s. 22 [Ex. Ch. 283
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RELEASE—Joint debtor - - - 81
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RELEASE OF JOINT DEBTOR—*Joint and Several Bond—Release of one of the Joint and Several Debtors—Principal and Surety.*] To an action on a bond the defendant pleaded that it was the joint and several bond of himself and J., and was executed by him as surety only for J.; that afterwards a composition deed was made between J. of one part, and the plaintiff and another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for the benefit of his creditors "in like manner" as if J. had been adjudged bankrupt; and each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bankruptcy;" and that the plaintiff executed this deed without the consent of the defendant. On demurrer:—*Held* (by Kelly, C.B., and Bramwell, B., Pigott, B., dissenting), a good plea. CRAGOE *v.* JONES 81

RENT—*Water-rate—Annual Value—Landlord paying Rates.*] By their local Act (16 Vict. c. xxii.) s. 79, the plaintiffs were bound to supply the houses within a certain district with water "at the following rate per annum, that is to say, where the *rent* of such dwelling-house" should not amount to 7*l.* per annum, at a rate not exceeding 6 per cent. per annum on such *rent*, but not exceeding 7*s.* 2*d.* per annum; and so on in a graduated scale.—The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district rate:—*Held* (affirming the judgment of the Court below), that "rent" in s. 79 was equivalent to "annual value;" and that, in estimating the rents on which the water-rate was payable, the defendant was entitled to deduct the rates so paid by him. THE SHEFFIELD WATERWORKS COMPANY *v.* BENNETT - - - Ex. Ch. 196

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SALE—Condition - - 175, Ex. Ch. 249
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—— Insurance—Stay and trade - Ex. Ch. 154
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12 & 13 Vict. c. 103, s. 16 - - - 37
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"STAY AND TRADE" — *Insurance — Usage of African Trade—Policy on Ship during "Stay and Trade"—Mixed Policy.*] The plaintiffs effected a policy of insurance with the defendants upon a ship at and from Liverpool to the west or south-west coast of Africa, "during her stay and trade there," and back to a port of call in the United Kingdom, at 8*l.* 8*s.* per cent., returning a per centage varying with the period of the risk, the ship being held covered at 13*s.* 4*d.* per cent. per month if more than twelve months out.—The ship proceeded to the African coast, and, after being loaded for the return voyage, remained at a port there for some weeks for a purpose in no way connected with trade. She was subsequently lost on the voyage home.—At the trial of an action on the policy, the judge ruled that, as the delay had not been for a trade purpose, there had been a deviation, and directed a verdict for the defendants. On the argument of a bill of exceptions tendered to this ruling:—*Held*, a proper direction. The Company of African Merchants, Limited, *v.* The British and Foreign Marine Insurance Company, Limited - - Ex. Ch. 154

STOCK EXCHANGE—Custom - Ex. Ch. 242
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SUCCESSION DUTY — *Alienation — Corporation —16 & 17 Vict. c. 51, ss. 2, 15, 27.*] In 1839 S. devised land to T. for life, with remainder (subject to limitations which failed) to W. in fee. During T.'s lifetime W. sold his remainder in fee to the defendants, a corporate society, and died. On the death of T. in 1872, the defendants entered into possession. W. was a cousin of the testatrix. On an information filed by the Crown:—*Held*, that the defendants must pay duty at the rate of 5*l.* per cent. on the principal value of the property (s. 27).—*Semble*, where a succession is alienated and falls into possession after the death of the alienor, duty is payable under s. 15 of the Succession Duty Act, 1853, at the same rate as if no alienation had been made, and the alienor had survived the falling into possession. Solicitor General *v.* Law Reversionary Interest Society [233

SUCCESSION DUTY ACT, 1853, ss. 2, 15, 27 233
See Succession Duty.

SUPERFLUOUS LAND — *Land not immediately available for the Purposes of the Railway, but bonâ fide retained for such Purposes—Lands Clauses Act, 1845 (8 Vict. c. 18), s. 127.*] Land which is taken by a railway company for the purposes of their Act, and which is bonâ fide retained by them with a reasonable expectation of using it for such purposes, does not at the expiration of ten years from the time fixed for the completion of the works vest in the adjoining owner as superfluous land under the Lands Clauses Act, 1845, s. 127, merely because, from insufficiency of traffic, or from want of funds, it is not immediately available for such purposes, although it is in the meanwhile let out to yearly tenants, and applied to purposes for which it is in its then condition suitable. Betts *v.* The Great Eastern Railway Company - - - - - - 294

SURETY—Discharge of - - - 73
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—— Joint bond—Release - - - 81
See Release of Joint Debtor.

SUSPENSION FROM PRACTICE—*Attorney.*] An attorney and solicitor having been suspended by the Master of the Rolls from practising in the Court of Chancery for ten years, this Court, on affidavits verifying (1) copies of the petition and order in Chancery and the affidavits filed there on the hearing of the petition, and (2) a transcript of a shorthand-writer's notes of the judgment, made a similar order, *unless* cause were shewn before the fourth day of next term. Re M—— T—— - - - - - - 62

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—— Stay and trade - - - Ex. Ch. 154
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VALUABLE SECURITY—*Poor*—12 & 13 *Vict. c.* 103, *s.* 16.] A judgment is a "valuable security" within the meaning of 12 & 13 Vict. c. 103, s. 16. The Guardians of the Poor of the West Ham Union *v.* Ovens. - - - - 37
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